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Stephen R. Cochell

University of Baltimore School of Law

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THE EXCLUSIONARY RULE AND ITS APPLICABILITY TO OSHA CIVIL ENFORCEMENT PROCEEDINGS

Stephen R. Cochell†

Historically, the exclusionary rule has been employed to prevent the use of illegally obtained evidence to convict a criminal defendant. In more recent years, inspections by administrative agencies seeking to enforce government regulations has raised the question of the exclusionary rule's applicability to civil proceedings. In this article the author traces the history of administrative searches and the development of the exclusionary rule, placing OSHA proceedings in the context of both. The author concludes that application of the rule will not promote deterrence of illegal agency conduct nor further the purposes for which OSHA was formed, and in the alternative that a good faith exception to the rule should be recognized.

I. INTRODUCTION

Congress broadly stated that its purpose in enacting the Occupational, Safety and Health Act of 1970¹ (the Act) was "[to] assure so far as possible every working man and woman in the nation safe and healthful working conditions"² Pursuant to this objective the Secretary of Labor, acting through the Occupational Safety and Health Administration (OSHA), adopted pre-existing "national consensus standards" and other "established federal standards"³ and subse-

† B.A., University of Maryland, Baltimore County, 1972; M.S.W., University of Maryland School of Social Work and Community Planning, 1975; J.D., University of Baltimore School of Law, 1978; LL.M. Candidate, Labor Law, Georgetown University Law Center, 1983; Lieutenant, Judge Advocate General Corps, U.S. Naval Reserve. Lieutenant Cochell is currently serving with the Navy Appellate Defense Division in Washington, D.C.

1. 29 U.S.C. §§ 651-678 (1976).

2. *Id.* § 651(b).

3. The Act defines national consensus standards as including those occupational and safety standards which have been: (1) adopted and promulgated by a recognized standards-producing organization; (2) formulated in such a way as to allow consideration of diverse views; and (3) designated a national consensus standard after consultation with other appropriate federal agencies. *Id.* § 652(9). In addition, the Secretary of Labor is authorized to adopt national consensus standards without rulemaking procedures as described in the Act. *Id.* The term "established federal standards" refers to standards previously established by other federal regulations or statutes. *Id.* § 652(10). The congressional purpose behind adoption of these pre-existing standards was to provide immediate protective coverage to

quently promulgated new and more stringent guidelines for the protection of the American worker.⁴ To enable OSHA to enforce compliance with these standards Congress passed a provision of the Act which authorizes the Secretary to enter into private commercial premises for the purpose of conducting inspections to ascertain the existence of safety and health violations.⁵ These inspections proceed pursuant to either a general administrative scheme for worksite inspections or upon filing of an employee complaint of standards violations.⁶

The turbulent history of litigation and controversy surrounding OSHA enforcement of safety standards has been attributed not only to the haste with which many pre-existing standards were adopted⁷ but also to the conflict generated by OSHA inspectors intruding into employers' once private workplaces. Predictably, employers challenged these warrantless inspections on fourth amendment grounds.⁸ The

workers. See S. REP. NO. 1282, 91st Cong., 2d Sess. 6 (1970), reprinted in 1978 U.S. CODE CONG. & AD. NEWS 517. See generally Rothstein, *OSHA After Ten Years: A Review and Some Proposed Reforms*, 34 VAND. L. REV. 71 (1981) [hereinafter cited as *OSHA After Ten Years*].

4. Virtually all the new OSHA standards have been subjected to court challenge. See, e.g., *American Textile Mfg. Inst. v. Donovan*, 452 U.S. 490 (1981) (cotton dust); *Taylor Diving & Salvage Co. v. United States*, 599 F.2d 622 (5th Cir. 1979) (hyperbaric diving); *Industrial Union Dep't, AFL-CIO v. Hodgson*, 499 F.2d 467 (D.C. Cir. 1974) (asbestos); *Dry Color Mfr's. Ass'n v. United States*, 486 F.2d 98 (3d Cir. 1973) (carcinogens).

5. See 29 U.S.C. § 657(a) (1976). This section states:

In order to carry out the purposes of this Act, the Secretary, upon presenting appropriate credentials to the owner, operator, or agent in charge, is authorized —

(1) to enter without delay and at reasonable times any factory, plant, establishment, construction site, or other area, workplace or environment where work is performed by an employee of an employer; and

(2) to inspect and investigate during regular working hours and at other reasonable times, and within reasonable limits and in a reasonable manner, any such place of employment and all pertinent conditions, structures, machines, apparatus, devices, equipment, and materials therein, and to question privately any such employer, owner, operator, agent or employee.

Id. If the employer refuses admittance to the OSHA inspectors, the normal procedure is for the OSHA official to return with a warrant. See 29 C.F.R. § 1903.6 (1982).

6. See 29 U.S.C. § 657(f)(1) (1976). This section provides that any employee or a representative of an employee may file a written complaint alleging violation of an OSHA standard or alleging that an imminent danger exists. If the Secretary determines that there are reasonable grounds to believe the violation or danger exists, he is required to make a special inspection as soon as practicable. *Id.* The general administrative inspection scheme is performed pursuant to *id.* § 657(a). See *supra* note 5.

7. See *OSHA After Ten Years*, *supra* note 3, at 73-74. See generally Moran, *Occupational Safety and Health Standards as Federal Law: The Hazards of Haste*, 15 WM. & MARY L. REV. 777 (1974).

8. The fourth amendment provides:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by

United States Supreme Court resolved this issue in *Marshall v. Barlow's, Inc.*,⁹ holding that nonconsensual warrantless inspections are prohibited by the fourth amendment.¹⁰ Although the Court in *Barlow's* resolved the narrow question of whether the warrant requirement of the fourth amendment applied in the OSHA context, the decision generated a plethora of questions, including the standard of probable cause to obtain a warrant, an employer's ability to resist entry despite the existence of a warrant, the requirement of exhaustion of administrative remedies, and the application of the exclusionary rule to evidence obtained from illegal OSHA inspections.¹¹ Indeed, the Occupational Safety and Health Review Commission (OSHRC)¹² recently held, in *Donovan v. Sarasota Concrete Co.*,¹³ that the exclusionary rule applies to evidence obtained during illegal OSHA

Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. CONST. amend. IV.

9. 436 U.S. 307 (1978).

10. *Id.* at 325.

11. See Rader, Lewis, & Ehlke, *OSHA Warrants and the Exhaustion Doctrine: May the Occupational Safety and Health Review Commission Rule on the Validity of Federal Court Warrants?*, 84 DICK. L. REV. 567 (1980); Rothstein, *OSHA Inspections after Marshall v. Barlow's, Inc.*, 1979 DUKE L.J. 63; Note, *Marshall v. Barlow's, Inc.: Are Employer's Fourth Amendment Rights Protected?*, 16 CAL. W.L. REV. 161 (1980).

12. OSHRC was established to adjudicate the validity of citations, penalties and abatement orders issued by OSHA. If an employer wishes to contest a penalty or abatement order he must notify the Secretary of Labor within 15 days, in which event the abatement order is automatically stayed. 29 U.S.C. §§ 659(a), (b), 666(d) (1976). An evidentiary hearing is then held before an administrative law judge of OSHRC. At this hearing, the burden is on the Secretary to establish the elements of the alleged violation and the propriety of his proposed abatement order and penalty. The judge is empowered to affirm, modify, or vacate any or all of these items, giving due consideration in his penalty assessment to the size of the business involved, the gravity of the violation, the good faith of the employer, and the history of previous violations. *Id.* § 666(i). The judge's decision becomes OSHRC's final and appealable order unless, within 30 days, a commissioner directs that it be reviewed by the full Commission. *Id.* §§ 659(c), 661(i), 666; see 29 C.F.R. §§ 2200.90-91 (1982). The Commission consists of three members, appointed for six-year terms, each of whom is qualified "by reason of training, education or experience" to adjudicate contested citations and assess penalties. 29 U.S.C. § 661 (1976).

If review is granted, the Commission's subsequent order directing abatement and the payment of any assessed penalty becomes final unless the employer timely petitions for judicial review in the appropriate federal court of appeals. *Id.* § 660(a). The Secretary similarly may seek review of OSHRC orders but, in either case, "[t]he findings of the Commission with respect to questions of fact, if supported by substantial evidence on the record considered as a whole, shall be conclusive." *Id.* If the employer fails to pay the assessed penalty, the Secretary may commence a collection action in a federal district court in which neither the fact of the violation nor the propriety of the penalty assessed may be retried. *Id.* § 666(k). Thus, the penalty may be collected without the employer's ever being entitled to a jury determination of the facts constituting the violations. See *Atlas Roofing Co. v. OSHRC*, 430 U.S. 442, 446-47 (1977).

13. 1981 O.S.H. DEC. (CCH) 31,527, *aff'd*, 693 F.2d 1061 (11th Cir. 1982).

inspections.¹⁴

This article examines the *Sarasota* decision and the question of whether the exclusionary rule is applicable to OSHA civil enforcement proceedings. A discussion of the law of administrative searches is then presented, followed by a precedential view and analysis of the purposes and policies underlying the exclusionary rule. After placing OSHA civil proceedings in the context of both the law of administrative searches and that of the exclusionary rule, it is concluded that the rule is inapplicable to OSHA because historically it has been limited to cases involving criminal or quasi-criminal penalties. It is also argued that the social costs of applying the exclusionary rule to OSHA proceedings far outweigh its deterrent effect.¹⁵ Alternatively, it is suggested that if the exclusionary rule is applied to OSHA proceedings, it should not apply to fourth amendment violations committed in good faith.

II. ADMINISTRATIVE SEARCHES

With the growth of government and the routine delegation of legislative authority to administrative bodies, in order to effectuate a broad range of social goals including employee health and safety, administrative inspections are a common tool for the agency charged with enforcement of standards set by Congress. Intrusions by government officials into traditionally private commercial areas have resulted in a proliferation of fourth amendment litigation and a concomitant scrutiny of administrative actions by the courts.¹⁶ An understanding of the law governing OSHA inspections may be gained by placing them in the context of the general body of law surrounding the administrative search.

In *Frank v. Maryland*,¹⁷ one of the earlier cases involving an administrative search, the Supreme Court upheld the defendant's criminal conviction for refusal to permit a warrantless inspection of his private home for rat infestation. In concluding that the search was not violative of due process, the Court observed that the primary purpose of the inspection was identification of a community health hazard rather than pursuit of criminal evidence.¹⁸ Moreover, ample grounds existed to support a warrantless entry into the premises in a reasonable

14. *But see supra* note 230 and accompanying text.

15. *But see* Trant, *OSHA and the Exclusionary Rule: Should the Employer Go Free Because the Compliance Officer Has Blundered?*, 1981 DUKE L.J. 667 [hereinafter cited as *OSHA and the Exclusionary Rule*].

16. *See, e.g.*, *United States v. Biswell*, 406 U.S. 311 (1972); *Colonnade Catering Corp. v. United States*, 397 U.S. 72 (1970); *Camara v. Municipal Court*, 387 U.S. 523 (1967); *See v. City of Seattle*, 387 U.S. 541 (1967). *See generally* Note, *Marshall v. Barlow's, Inc.: Are Employer's Fourth Amendment Rights Protected?*, 16 CAL. W.L. REV. 161 (1980); Note, *Rationalizing Administrative Searches*, 77 MICH. L. REV. 1291 (1979).

17. 359 U.S. 360 (1959).

18. *Id.* at 371-72.

manner and at a reasonable time. Citing the need to maintain basic minimal standards of housing and to prevent the spread of disease, the Court held that Frank's privacy interests were, at most, on the "periphery" of the fourth amendment's prohibition against unwarranted governmental intrusion.¹⁹ This holding was correct in light of the long standing scheme of regulatory enforcement for the general welfare dating back to colonial days.²⁰

Subsequent cases, however, overruled that portion of *Frank* which approved warrantless inspections. In the companion cases of *Camara v. Municipal Court*²¹ and *See v. City of Seattle*,²² the Supreme Court held that the warrant requirement of the fourth amendment applied to administrative searches of private and commercial dwellings. In *Camara*, the lessee of a building refused to permit a warrantless inspection of a portion of his leasehold by a housing inspector.²³ The Court held that the lower courts erred in denying *Camara's* writ of prohibition, which was based on the ground that San Francisco's Housing Code authorizing warrantless inspections was unconstitutional. The Court specifically rejected the *Frank* Court's assertion that administrative inspections touched only the "periphery" of protected privacy interests.²⁴ Paraphrasing a portion of Justice Douglas' dissent in *Frank*, the Court stated that "[i]t is surely anomalous to say that the individual and his private property are fully protected by the fourth amendment only when the individual is suspected of criminal behavior."²⁵ The Court found that administrative searches involve a "significant intrusion" upon individual privacy interests and that the fourth amendment requires that a warrant be based upon probable cause.²⁶

The Court in *Camara* further held that, although the standard for issuance of an administrative warrant was probable cause, the test in the civil context is different from the test utilized for issuance of warrants to conduct a search for evidence of criminal violations.²⁷ In testing for administrative probable cause, the magistrate must balance the governmental interest favoring intrusion against individual privacy interests to determine whether a search is reasonable under the fourth amendment.²⁸ In its consideration of area code inspection programs,

19. *Id.* at 367. *But see* *Eaton v. Price*, 364 U.S. 263 (1960) (per curiam) (Justice Brennan observed that *Frank* was "the dubious pronouncement of a gravely divided Court").

20. *Frank v. Maryland*, 359 U.S. 360, 367 (1959).

21. 387 U.S. 523 (1967).

22. 387 U.S. 541 (1967).

23. The purpose of the inspection was to determine if the lessee was residing in the rear of the leasehold against housing regulations. *Camara v. Municipal Court*, 387 U.S. 523, 526 (1967).

24. *Id.* at 530.

25. *Id.* (paraphrasing *Frank v. Maryland*, 359 U.S. 360, 374 (1959) (Douglas, J., dissenting)).

26. *Camara v. Municipal Court*, 387 U.S. 523, 534 (1967).

27. *Id.* at 535.

28. *Id.* at 534-37. *But see* *Aguilar v. Texas*, 378 U.S. 108 (1964) (a magistrate employs

the Court concluded that programs primarily designed for the prevention or abatement of dangerous housing or safety conditions were reasonable by virtue of custom, the interest in public safety, and the fact that such inspections were neither personal in nature nor utilized as a search for evidence of criminal activity.²⁹ Accordingly, administrative probable cause to issue a warrant may be found to exist "if reasonable legislative or administrative standards for conducting an area inspection are satisfied with respect to a particular dwelling."³⁰

In *See v. City of Seattle*,³¹ a fire department inspector was refused entry into a locked commercial warehouse by the owner while attempting to conduct a routine area inspection in compliance with Seattle's Fire Code. The owner was prosecuted and convicted under the local ordinance requiring access to buildings. In reversing the conviction the Supreme Court reiterated its view that area code inspections are an important tool for regulatory enforcement, but held that private commercial businesses are entitled to the same fourth amendment protections against administrative inspections as are private dwellings.³² "The businessman, like the occupant of a residence, has a constitutional right to go about his business free from unreasonable official entries upon his private commercial property."³³

The viability of the *Camara* and *See* decisions prohibiting warrantless administrative inspections was apparently undercut by two subsequent rulings in *Colonnade Catering Corp. v. United States*³⁴ and *United States v. Biswell*.³⁵ In *Colonnade*, the Supreme Court upheld a warrantless inspection of the commercial premises of a licensed liquor dealer conducted under a federal statute authorizing inspections to ascertain compliance with licensing laws.³⁶ The Court distinguished the *Camara-See* warrant requirement by virtue of the long history of governmental regulation of the liquor industry predating the fourth amendment and the broad latitude afforded Congress to design inspection laws to "meet the evils at hand."³⁷

Similarly, in *Biswell*, the Supreme Court held that Congress could authorize warrantless searches of licensed firearms dealers.³⁸ The

no balancing test in determining whether probable cause exists to issue a warrant to search for criminal activity. Rather, the magistrate makes a disinterested determination based on the facts before him and inferences logically drawn therefrom that probable cause exists).

29. *Camara v. Municipal Court*, 387 U.S. 523, 537 (1967).

30. *Id.* at 538.

31. 387 U.S. 541 (1967).

32. *Id.* at 545-46; see also *Silverthorne Lumber Co. v. United States*, 251 U.S. 385 (1920) (holding that commercial premises are entitled to the same fourth amendment protection as private residential dwellings).

33. *See v. City of Seattle*, 387 U.S. 541, 543 (1967).

34. 397 U.S. 72 (1970).

35. 406 U.S. 311 (1972).

36. *Colonnade Catering Corp. v. United States*, 397 U.S. 72, 76-77 (1970).

37. *Id.* at 76.

38. *United States v. Biswell*, 406 U.S. 311, 313, 316 (1972).

Court reasoned that warrantless inspections are an important part of regulatory schemes because they assure that weapons are properly distributed and controlled.³⁹ The Court noted that while periodic inspections were sufficient in *See* to determine building code violations, the governmental regulatory scheme for controlling firearms requires unannounced, warrantless inspections to serve as a deterrent to violations.⁴⁰ "When a dealer chooses to engage in this pervasively regulated business and to accept a federal license, he does so with the knowledge that his business records, firearms, and ammunition will be subject to effective regulations."⁴¹

The apparent erosion of the *Camara-See* approach arguably came to a halt in *G.M. Leasing Corp. v. United States*,⁴² where the Supreme Court specifically reaffirmed its decision in *Camara* and held that the warrantless, forced entry by IRS agents into a private office for seizure of books and records fell outside the *Colonnade-Biswell* exceptions. The Court stated that neither the history of the common law, the Bill of Rights, nor subsequent case law justified the creation of a broad exception to the warrant requirement in furtherance of tax enforcement.⁴³

Against this backdrop of evolving law, Congress enacted section 657(a) of the Act.⁴⁴ The constitutional challenge to the warrantless inspections that were authorized by section 657(a) was resolved in the landmark case of *Marshall v. Barlow's, Inc.*⁴⁵ In *Barlow's* an OSHA inspector requested permission to conduct a routine inspection of the work area in the defendant's electrical and plumbing plant to insure compliance with safety and health regulations. Barlow, when informed that the inspector did not possess a search warrant, refused to admit him. Pursuant to regulation,⁴⁶ OSHA petitioned the Idaho federal district court to issue an order compelling Barlow to admit the inspector.

The company sought and obtained injunctive relief against the warrantless search.⁴⁷ On appeal to the Supreme Court, OSHA posited three arguments favoring warrantless OSHA inspections. First, it asserted that warrantless inspections to enforce standards promulgated under the Act were reasonable under the fourth amendment because Congress authorized such inspections to enforce compliance with those

39. *Id.* at 315-16.

40. *Id.* at 315.

41. *Id.*

42. 429 U.S. 338 (1977).

43. *Id.* at 354-55; see also *Michigan v. Tyler*, 436 U.S. 499 (1978) (holding that fire inspectors must secure a warrant to inspect private premises subsequent to a fire). *But cf.* *Air Pollution Variance Bd. v. Western Alfalfa Corp.*, 416 U.S. 861 (1974) (warrantless entry into outdoor premises to conduct air quality test of smoke fumes held permissible under "openfields" exception).

44. 29 U.S.C. § 657(a) (1976). See *supra* note 5 for the text of this section.

45. 436 U.S. 307 (1978).

46. See 29 C.F.R. § 1903.4 (1982) (section unchanged since time it was considered by court).

47. *Marshall v. Barlow's, Inc.*, 436 U.S. 307, 310 (1978).

standards.⁴⁸ Second, OSHA argued that the inspections fell within the recognized *Colonnade-Biswell* exception since industries and businesses within OSHA's jurisdiction were "pervasively regulated"⁴⁹ industries "long subject to close supervision and inspection."⁵⁰ Finally, OSHA argued that a warrant requirement would impose a serious burden on the inspection system as it would deprive OSHA of the advantage of surprise.⁵¹

In a five to three majority, the Supreme Court rejected these arguments and held that the fourth amendment protects places of business as well as residences.⁵² As in *Camara*, warrantless searches were held to be generally unreasonable unless they fell within the recognized exceptions enunciated in *Colonnade* and *Biswell*. The Court rejected the government's argument that *all* businesses involved in interstate commerce are subject to the "pervasive regulation" and "close supervision" which implies a consent to warrantless OSHA inspections.⁵³

The Court similarly disposed of OSHA's claim that a warrant requirement would seriously hamper its enforcement efforts by depriving OSHA inspectors of the element of surprise, because OSHA's own regulations had the same practical effect.⁵⁴ The Court also stated its belief that the majority of businessmen would consent to inspections without a warrant, and absent hard evidence of any widespread pattern of employer refusal to consent the Court would not consider the issue.⁵⁵ Alternatively, the Court stated that OSHA could promulgate regulations authorizing the use of ex parte warrants to inspect businesses without

48. *Id.* at 311.

49. *Id.* at 313 (quoting *United States v. Biswell*, 406 U.S. 311, 316 (1972)).

50. *Marshall v. Barlow's, Inc.*, 436 U.S. 307, 313 (1978) (quoting *Colonnade Catering Corp. v. United States*, 397 U.S. 72, 77 (1970)).

51. *Marshall v. Barlow's, Inc.*, 436 U.S. 307, 316 (1978).

52. *Id.* at 312.

53. OSHA argued that the Walsh-Healey Act of 1936, which set minimum wages and hours, supported the conclusion that all businesses engaged in interstate commerce were subject to close supervision of employee safety and health conditions. See 41 U.S.C. §§ 35-45 (1976). The Court specifically found, however, that federal regulation of hours and wages did not approach the degree of specificity and pervasiveness required under the *Colonnade-Biswell* exception. *Marshall v. Barlow's Inc.*, 436 U.S. 307, 314 (1978).

54. *Marshall v. Barlow's, Inc.*, 436 U.S. 307, 317-18 (1978). OSHA's regulations provide that upon refusal by an employer to permit entry by OSHA inspectors, the inspector should report to his supervisor who shall "promptly take appropriate action, including compulsory process if necessary." See 29 C.F.R. § 1903.6 (1982). The Court indicated that the OSHA regulation appeared to give the employer the type of notice which precluded surprise inspections. "If this safeguard endangers the efficient administration of OSHA, the Secretary should never have adopted it, particularly when the Act does not require it." *Marshall v. Barlow's, Inc.*, 436 U.S. 307, 319 (1978).

55. *Marshall v. Barlow's, Inc.*, 436 U.S. 307, 316 (1978). In a footnote, the Court indicated that if inspection efforts were hampered by the emergence of a pattern of refusal to consent, then the Court would seriously consider impairment of the inspection scheme as a factor in balancing the need for inspection versus the employer's privacy interests. *Id.* at 316 n.11.

prior notice if surprise was important to the inspection scheme.⁵⁶

While holding that the warrant requirement does apply to nonconsensual OSHA inspections, the Court in *Barlow's* adopted the *Camara* test of probable cause for administrative search warrants rather than the criminal law standard.⁵⁷ The Court reasoned that the warrant requirement is necessary to protect employers from the unbridled discretion that the Act delegates to administrators in deciding who and when to search.⁵⁸ A neutral magistrate may assure that the search is reason-

56. *Id.* at 310 n.15. OSHA promptly promulgated regulations authorizing ex parte warrants. These regulations were challenged and a district court judge issued a preliminary injunction requiring OSHA to afford an employer notice prior to application for issuance of a warrant. Electing not to appeal, OSHA attempted to evade the impact of the order by issuing an "interpretation" of the earlier regulation and moving to dissolve the preliminary injunction. On appeal of the trial court's denial of the OSHA motion, the Third Circuit affirmed the trial court's rulings on the ground that OSHA failed to provide notice and comment prior to rulemaking. *Cerro Metal Prod. v. Marshall*, 620 F.2d 964 (3d Cir. 1980). OSHA subsequently issued a rule, after proper notice and comment, authorizing issuance of ex parte warrants. See 29 C.F.R. § 1903.4 (1982).

57. *Marshall v. Barlow's, Inc.*, 436 U.S. 307, 320 (1978). The Court stated that probable cause:

may be based not only on specific evidence of an existing violation but also on a showing that reasonable legislative standards for conducting an . . . inspection are satisfied with respect to a particular [establishment]. A warrant showing that a specific business has been chosen for an OSHA search on the basis of a general administrative plan for the enforcement of the Act derived from neutral sources such as . . . dispersion of employees in various types of industries across a given area, and the desired frequency of searches in any of the lesser divisions of the area, would protect an employer's [f]ourth [a]mendment right.

Id. at 320-21.

58. *Id.* One commentator correctly observed that the Court in *Barlow's* deleted the modifier "area" preceding the term inspection in the *Camara* standard. Since the *Camara* Court contemplated health inspections encompassing large areas at a time, the *Barlow's* Court by deletion of the term "area" has narrowed the scope of a "reasonable" inspection. Within the same passage, the Court also deleted the term "dwelling" and substituted "establishment," thus broadening the protections afforded. See Note, *Marshall v. Barlow's, Inc.: Are Employer's Fourth Amendment Rights Protected?*, 16 CAL. W.L. REV. 161, 177 (1980).

Subsequent to the *Barlow's* decision, the Supreme Court was confronted with an administrative inspection scheme that was superficially similar to that embodied in section 657(a) of the Act. In *Donovan v. Dewey*, 452 U.S. 594 (1981), the warrantless inspection provision of the Mine Safety and Health Act (MSHA), 30 U.S.C. § 813(a) (1976 & Supp. V 1981), was upheld in the face of claims that such inspections were unreasonable searches prohibited by the fourth amendment. Unlike the OSHA inspection scheme, which covers a broad spectrum of all industries and businesses engaged in or affecting commerce, the MSHA regulatory scheme covers only the mining industry and carefully delineates the purpose, frequency and scope of mine inspections. In pertinent part, the statutory provisions of MSHA require mine inspectors to conduct inspections of all surface mines at least twice annually and all underground mines four times annually, in addition to requiring follow-up inspections of mines where previous violations were discovered. *Id.* Moreover, MSHA requires inspections of mining operations generating explosive gases at irregular 5-, 10-, or 15-day intervals. *Id.* § 813(i).

The Court felt that this inspection program fell within the ambit of the *Colonade-Biswell* exception because the frequency and regularity of mine inspections

able under the Constitution, authorized by statute, and conducted pursuant to a plan containing specific criteria.⁵⁹ Moreover, a warrant serves to delineate the object and scope of the intrusion permitted OSHA in conducting the inspection.⁶⁰

The Court in *Barlow's* settled the issue of whether the warrant requirement of the fourth amendment applied to OSHA inspections and offered general guidance in determining probable cause for authorizing inspections. The Court, however, did not determine the judicial sanctions for noncompliance with the fourth amendment warrant requirement.

III. AN OVERVIEW OF THE EXCLUSIONARY RULE

Prior to a determination of whether the exclusionary rule should be applied in an administrative proceeding, it is important to place the rule in its historical context. The Supreme Court fashioned the exclusionary rule in the seminal case of *Weeks v. United States*⁶¹ when it reversed a conviction for illegal use of the mails to transmit lottery tickets. The conviction was based on a warrantless search and seizure of papers and letters found in Week's home. The primary concern of the Court in *Weeks* was the potential involvement by the judiciary in unconstitutional behavior by permitting illegally obtained evidence to come before the courts. "To sanction such proceedings would be to affirm by judicial decision a manifest neglect if not an open defiance of the prohibitions of the Constitution, intended for the protection of the people against such unauthorized action."⁶² The Court reasoned that if letters and other documents could be seized without authority, the protections of the fourth amendment are of no value, and "might as well be stricken from the Constitution."⁶³ Thus, the Court refused to place

constitutes the type of pervasive regulation that was lacking in OSHA's scheme. The critical determinant in upholding the reasonableness of MSHA's inspection scheme, as contrasted to OSHA's, turned on the fact that "rather than leaving the frequency and scope of inspections to the unchecked discretion of government officers, [MSHA] establishes a predictable and guided federal regulatory presence." *Donovan v. Dewey*, 452 U.S. 594, 604 (1981). In balancing the fourth amendment's prohibitions against unreasonable searches with the substantial federal interests in improving the health and safety conditions of the nation's mines, the Court concluded that the certainty and regularity of the inspection scheme provided a constitutionally adequate substitute for a warrant. *Id.* at 602-06.

59. *Marshall v. Barlow's, Inc.*, 436 U.S. 307, 323 (1978).

60. *Id.*

61. 232 U.S. 383 (1914).

62. *Id.* at 394.

63. *Id.* at 393. The Court further stated that:

The efforts of the courts and their officials to bring the guilty to punishment, praiseworthy as they are, are not to be aided by the sacrifice of those great principles established by years of endeavor and suffering which have resulted in their embodiment in the fundamental law of the land.

Id.; see also *Boyd v. United States*, 116 U.S. 616 (1886) (Court held, in dictum,

its judicial imprimatur on illegal police conduct.⁶⁴

It was not until 1961 that the Court held, in *Mapp v. Ohio*,⁶⁵ that the exclusionary rule is constitutionally compelled under the fourth amendment and therefore applicable to the states.⁶⁶ Because the right of privacy is an essential ingredient of the fourth amendment, the Court in *Mapp* held that states must exclude illegally seized evidence. "To hold otherwise is to grant the right, but in reality, to withhold its privilege and enjoyment."⁶⁷ The Court then reiterated a conclusion it had reached the previous year in *Elkins v. United States*:⁶⁸ that the purpose of the exclusionary rule is to deter constitutional violations by removing the incentives for official misconduct.⁶⁹ Thus, the Court premised its decision in *Mapp* on dual grounds: the fourth amendment right to privacy and the need for deterrence of malfeasance.

In *Linkletter v. Walker*,⁷⁰ the Court retreated from its constitutional interpretation that required application of the exclusionary rule. Faced with the troublesome question of whether the exclusionary rule should be applied retroactively to convictions finalized prior to *Mapp*, the Court sub silentio held that *Mapp* was not premised on independent fourth amendment grounds but was a function of the need for deterrence of police misconduct.⁷¹

Since *Linkletter*, the Court has consistently articulated the deterrent theory as its principal purpose for exclusion of unconstitutionally acquired evidence.⁷² In *Bivens v. Six Unknown Named Agents*⁷³ it be-

that to force the defendant in a forfeiture proceeding to produce documents was unconstitutional).

64. See generally *OSHA and the Exclusionary Rule*, *supra* note 14, at 674-75. In *Wolf v. Colorado*, 338 U.S. 25 (1949), however, the Court refused to extend the exclusionary rule in *Weeks* to the states since "[*Weeks*] was not derived from the explicit requirements of the fourth amendment; it was not based on legislation expressing congressional policy in the enforcement of the Constitution. The decision was a matter of judicial implication." *Id.* at 28. Even though the Court held the fourth amendment inapplicable to the states, use of the exclusionary rule was not considered the only sanction which would satisfy the minimal standards assured by the due process clause of the fourteenth amendment. *Id.* at 31. Common law damage actions and penal sanctions were available against police officials who transgressed the law. *Id.* at 30-31 n.1.

65. 367 U.S. 643 (1961).

66. *Id.* at 655-57.

67. *Id.* at 656.

68. 364 U.S. 206 (1960).

69. *Mapp v. Ohio*, 367 U.S. 643, 656 (1961).

70. 381 U.S. 618 (1966).

71. *Id.* at 620. It is apparent that the Court's decision in *Linkletter* was a result-oriented decision designed to avoid the retroactive application of *Mapp* to numerous state defendants seeking a rehearing on evidentiary matters. *Id.* at 636-37. The vast implications of finding the exclusionary rule to be based on independent fourth amendment grounds apparently influenced the Court to adopt deterrence as its primary goal in adhering to the exclusionary rule. *Accord OSHA and the Exclusionary Rule*, *supra* note 14, at 684-85.

72. See, e.g., *United States v. Caceres*, 440 U.S. 741 (1979); *United States v. Janis*, 428 U.S. 433 (1976); *Michigan v. Tucker*, 417 U.S. 433 (1974); *United States v. Calandra*, 414 U.S. 338 (1974). *But cf. Terry v. Ohio*, 392 U.S. 1 (1968). In *Terry*, the

came apparent, however, that the Burger Court would narrowly construe the exclusionary rule and seek to limit its application. While the Court permitted a cause of action under the fourth amendment for damages resulting from a warrantless entry of petitioner's home, Chief Justice Burger, in dissent, attacked the exclusionary rule as "an anomalous and ineffective mechanism with which to regulate law enforcement."⁷⁴ Aside from the criticism that the exclusionary rule had failed to deter deliberate fourth amendment violations, the Chief Justice assailed the fact that the rule was applied with equal force to both flagrant and inadvertent violations.⁷⁵ Chief Justice Burger did not suggest, however, that the exclusionary rule be abandoned. Instead, the dissent recommended that the "capital punishment" of the exclusionary rule be applied only to substantial constitutional violations based upon a balancing of competing interests in presentation of truth and deterrence of unlawful police conduct.⁷⁶

In *Michigan v. Tucker*⁷⁷ the Court began to tip the balance in favor of admitting evidence obtained in technical violation of the fourth amendment. The Court refused to suppress the identity of a witness discovered during a pre-*Miranda*⁷⁸ interrogation when the defendant was advised of his right to remain silent and right to counsel but not of his right to court appointed counsel. The Court reemphasized its belief that the primary purpose of the exclusionary rule is to deter unlawful police conduct and thereby effectuate rights guaranteed by the fourth

Court held that the primary thrust of the exclusionary rule was deterrence, but observed that "the rule also serves another vital function—the imperative of judicial integrity. . . . Courts which sit under our Constitution cannot and will not be made a party to lawless invasions of the constitutional rights of citizens by permitting unhindered governmental use of the fruits of such invasions." *Id.* at 12-13 (citations omitted).

73. 403 U.S. 388 (1971).

74. *Id.* at 420 (Burger, C.J., dissenting).

75. *Id.* at 418.

76. *Id.* at 419. Chief Justice Burger suggested a consideration of the proposed "substantial violation" test found in MODEL CODE OF PRE-ARRAIGNMENT PROCEDURE § 558.02(2), at 23 (Tent. Draft No. 4 1971). *Bivens v. Six Unknown Named Agents*, 403 U.S. 388, 419, 425 (1971) (Burger, C.J., dissenting). The question of whether the exclusionary rule actually deters police misconduct is open. See Canon, *The Exclusionary Rule: Have Critics Proven That It Doesn't Deter Police?* 62 JUDICATURE 398 (1979); Kamisar, *Does the Exclusionary Rule Affect Police Behavior?* 62 JUD. 70 (1978); Oaks, *Studying the Exclusionary Rule in Search and Seizure*, 37 U. CHI. L. REV. 665, 667 (1970); Schlesinger, *The Exclusionary Rule: Have Proponents Proven That It Is A Deterrent to Police?* 62 JUDICATURE 404 (1979); Spiotto, *Search and Seizure: An Empirical Study of the Exclusionary Rule and Its Alternatives*, 2 J. LEGAL STUD. 243 (1973). The Supreme Court, in recognizing the inability of social scientists to establish the effective impact of the exclusionary rule, still adheres to the underlying assumption of the rule. See *Stone v. Powell*, 428 U.S. 465, 492-93 (1976).

77. 417 U.S. 433 (1974).

78. The defendant was arrested prior to the Court's decision in *United States v. Miranda*, 384 U.S. 436 (1966). The witness was a purported alibi witness whose testimony at trial did not relate to matters adduced at the interrogation. *Michigan v. Tucker*, 417 U.S. 433, 445 (1974).

amendment. The Court, however, concluded that the deterrence rationale does not apply when police officers conduct themselves in complete good faith:

The deterrent purpose of the exclusionary rule necessarily assumes that the police have engaged in willful, or at the very least negligent, conduct which has deprived the defendant of some right. By refusing to admit evidence gained as a result of such conduct, the courts hope to instill in those particular investigating officers, or in their future counterparts, a greater degree of care toward the rights of an accused. Where the official action was pursued in complete good faith, however, the deterrence rationale loses much of its force.⁷⁹

Because the police officers in *Tucker* observed the defendant's pre-*Miranda* rights in good faith, the subsequent holding in *United States v. Miranda*⁸⁰ did not justify recourse to the exclusionary rule when the goal of deterrence of willful or negligent police conduct could not be achieved.⁸¹

The Burger Court further advanced its support for a good faith exception to the exclusionary rule in *Michigan v. DeFilippo*⁸² where the Chief Justice, writing for the majority, declined to apply the exclusionary rule to evidence seized in a good faith arrest pursuant to an ordinance later declared unconstitutional.

[T]here was no controlling precedent that this ordinance was or was not constitutional, and hence the conduct observed violated a presumptively valid ordinance. A prudent officer, in the course of determining whether respondent had committed an offense under all the circumstances shown by his record, should not have been required to anticipate that a court would later hold the ordinance unconstitutional.⁸³

The Court reasoned that police are charged to enforce laws unless or until they are declared unconstitutional.⁸⁴ It is not within the scope of a police officer's duty to determine whether a particular ordinance is unconstitutional unless a law is so "grossly and flagrantly unconstitutional that any person of reasonable prudence would be bound to see

79. *Michigan v. Tucker*, 417 U.S. 433, 447 (1974).

80. 384 U.S. 436 (1966).

81. *Michigan v. Tucker*, 417 U.S. 433, 447-48 (1974). Compare *United States v. Johnson*, 102 S.Ct. 2579 (1982) (retroactive application of rule required when police conduct warrantless, nonconsensual invasion of suspect's home in order to effect a routine felony arrest) with *United States v. Peltier*, 422 U.S. 531 (1975) (retroactive application of the exclusionary rule not required when border patrol agents conducted a good faith border search pursuant to long-standing administrative regulations and judicial approval).

82. 443 U.S. 31 (1979).

83. *Id.* at 37-38.

84. *Id.* at 38.

its flaws.”⁸⁵ Because the presumptively valid ordinance permitted arrest under the circumstances and the evidence was discovered in a search incident to arrest, the Court concluded that the subsequent invalidation of the law did not undermine the validity of the arrest.⁸⁶ Thus, the evidence was admissible.

The evolution of the good faith exception to the exclusionary rule culminated in the controversial decision of the Fifth Circuit in *United States v. Williams*.⁸⁷ There the court, sitting en banc, announced its adherence to the good faith exception:

[E]vidence is not to be suppressed under the exclusionary rule when it is discovered by officers in the course of actions that are taken in good faith and in the reasonable, though mistaken, belief that they are authorized. We do so because the exclusionary rule exists to deter willful or flagrant actions by police, not reasonable, good-faith ones. *Where the reason for the rule ceases, its application must cease also.* The costs to society of applying the rule beyond the purposes it exists to serve are simply too high — in this instance the release on the public of a recidivist drug smuggler — with few or no offsetting benefits. We are persuaded that both reason and authority support this conclusion.⁸⁸

As enunciated by the Fifth Circuit in *Williams*, the good faith exception has two separate facets: (1) the technical violation; and (2) the good faith mistake.⁸⁹ The *Williams* court defined the technical violation facet of the good faith exception as including those actions taken by police under statutes later declared unconstitutional or later construed differently, provided the police officer's belief that the statute was valid was both bona fide and reasonable. The *Williams* court emphasized that suppression of evidence would result if the officers can be charged with knowledge that the search violated the fourth amendment or that the law was obviously unconstitutional.⁹⁰ Thus, the good faith exception to the exclusionary rule applies to actions by police officers which, while mistaken, are both reasonable and done in good faith.⁹¹

85. *Id.*

86. *Id.* at 40.

87. 622 F.2d 830 (5th Cir. 1980) (en banc) (per curiam), *cert. denied*, 449 U.S. 1127 (1981).

88. 622 F.2d at 840. (emphasis added).

89. *Id.* at 841. See Ball, *Good Faith and the Fourth Amendment: The "Reasonable" Exception to the Exclusionary Rule*, 69 CRIM. L. & CRIMINOLOGY 635 (1978).

90. *United States v. Williams*, 622 F.2d 830, 845 (5th Cir. 1980) (en banc) (per curiam) (citing *Michigan v. DeFillippo*, 443 U.S. 31 (1979); *United States v. Peltier*, 422 U.S. 531 (1975)), *cert. denied*, 449 U.S. 1127 (1981).

91. *United States v. Williams*, 622 F.2d 830, 844 (5th Cir. 1980) (en banc) (per curiam), *cert. denied*, 449 U.S. 1127 (1981); see also *United States v. Caceres*, 440 U.S. 741 (1979) (the Court, noting that the IRS attempted good faith compliance with their regulations, held that exclusion of evidence in a criminal trial was inappropriate since the violation of the regulations did not rise to a level requiring application of the rule); *United States v. Hill*, 500 F.2d 315 (5th Cir. 1974) (exclu-

Although the court in *Williams* acknowledged that their decision arguably undercuts the fourth amendment, it asserted that the holding only narrowed the application of the exclusionary rule to its stated purpose: deterrence of unreasonable or bad faith police conduct.⁹² The *Williams* court declined a mechanical application of the exclusionary rule in those situations where the underlying policies of the fourth amendment would not be served.

For here the cost of applying the rule is one paid in coin minted from the very core of our fact-finding process, the cost of holding trials at which the truth is deliberately and knowingly suppressed This is a high price indeed and one that ought never to be paid where, in reason, no deterrence is called for and none can in fact be had.⁹³

Although the *Williams* decision has been criticized as both simplistic and overbroad,⁹⁴ it accurately reflects the direction and tone of the Burger Court.⁹⁵

IV. OSHA AND THE EXCLUSIONARY RULE

A fourth amendment analysis of OSHA inspections involves two distinct questions: first, whether a constitutional violation has occurred, and second, whether the exclusionary rule should be applied. Although *Marshall v. Barlow's, Inc.*⁹⁶ resolved the first question, it did not address the second. Subsequent litigation in the courts has produced a variety of results.

The Ninth Circuit, in *Todd Shipyard Industries v. Secretary of Labor*,⁹⁷ suggested that because the Supreme Court had never applied the exclusionary rule in civil proceedings, the rule should not be applied in OSHA hearings.⁹⁸ In *Savina Home Industries Inc. v. Secretary of Labor*,⁹⁹ the Tenth Circuit reached, in dictum, the opposite conclusion. Although confronted with the narrow question of whether a pre-Bar-

sionary rule not applied to deficient warrant when procedural error was technical and exclusion would not serve deterrence as police acted in good faith), *cert. denied*, 420 U.S. 931 (1975).

92. *United States v. Williams*, 622 F.2d 830, 847 (5th Cir. 1980) (en banc) (per curiam), *cert. denied*, 449 U.S. 1127 (1981).

93. 622 F.2d at 847.

94. See Mertens & Wasserstrom, *The Good Faith Exception to the Exclusionary Rule: Deregulating the Police and Derailing the Law*, 70 GEO. L. J. 365, 425 (1981).

95. Indeed, the Court in recently restoring a case to the calendar for reargument requested the parties to address the question of modifying the exclusionary rule so as to recognize the good faith exception in the context of a criminal proceeding. See *Illinois v. Gates*, 51 U.S.L.W. 3415 (U.S. Nov. 30, 1982) (No. 81-430). Interestingly, the Court had earlier refused a request by the State of Illinois to argue this very issue. *Id.* (Stevens, J., dissenting).

96. 436 U.S. 307 (1978).

97. 586 F.2d 683 (9th Cir. 1978).

98. *Id.* at 689.

99. 594 F.2d 1358 (10th Cir. 1979).

low's search qualified for retroactive application of the exclusionary rule, the court considered the question of whether the rule could apply in a civil proceeding. Acknowledging that the Supreme Court had never so applied the exclusionary rule,¹⁰⁰ the *Savina* court reasoned that the Supreme Court had applied it in quasi-criminal proceedings.¹⁰¹ Finding the OSHA inspections and penalties quasi-criminal in character,¹⁰² the court assumed that the exclusionary rule would apply to illegal inspections. "Certainly considerations of preserving judicial integrity and deterring official lawlessness do not become inconsequential simply because an illegal search is conducted by the Department of Labor instead of . . . the Department of Justice."¹⁰³ While this broad statement in *Savina* possesses superficial appeal, the court's characterization of OSHA proceedings as being quasi-criminal in character requires closer scrutiny.

A. OSHA Penalties: Quasi-Criminal Sanctions?

The question of whether a statute is civil or quasi-criminal in character is ultimately one of statutory construction.¹⁰⁴ In *Kennedy v. Mendoza-Martinez*,¹⁰⁵ the Supreme Court held that a statute providing for divestiture of citizenship for citizens leaving or remaining outside the

100. *Id.* at 1362. (citing *United States v. Janis*, 428 U.S. 433 (1976)).

101. *Savina Home Indus., Inc. v. Secretary of Labor*, 594 F.2d 1358 (10th Cir. 1979).

102. *But cf.* *Atlas Roofing Co. v. OSHRC*, 518 F.2d 990 (5th Cir. 1975), *aff'd*, 430 U.S. 442 (1977). In *Atlas*, the Fifth Circuit considered whether OSHA civil penalties are quasi-criminal sanctions. The court held that OSHA penalties are civil in nature and that imposition of such penalties does not entitle employers to a jury trial under the seventh amendment. 518 F.2d at 1011. On appeal, the Supreme Court did not expressly adopt or reject the functional analysis of the Fifth Circuit, although it can be argued that the Court implicitly accepted the lower court's analysis of the issue. See 430 U.S. at 449 n.5. Notably, the Tenth Circuit in *Savina* did not comment on the *Atlas* decision in resurrecting the theory that OSHA penalties are quasi-criminal. In fact, one commentator, in concluding that OSHA penalties are quasi-criminal, also failed to address or distinguish *Atlas* in his analysis. See *OSHA and the Exclusionary Rule*, *supra* note 14, at 692-707.

In *Savina*, the Court adopted the definition of "quasi-criminal" enumerated in Clark, *Civil and Criminal Penalties and Forfeitures: A Framework for Constitutional Analysis*, 60 MINN. L. REV. 379 (1976). That definition states:

Laws that provide for punishment but are civil rather than criminal in form have sometimes been labeled "quasi-criminal" by the Supreme Court. These laws, *broadly* speaking, provide for civil money penalties, forfeitures of property, and the punitive imposition of various disabilities, such as the loss of professional license or public employment.

Id. at 381 (emphasis added). This article's analysis of monetary penalties, however, suggests that the severity of the penalty is important in determining whether it is penal in nature. A penalty of \$1,000 might or might not be severe depending on the financial status of the individual law breaker.

103. *Savina Homes Indus., Inc. v. Secretary of Labor*, 594 F.2d 1358, 1363 (10th Cir. 1979).

104. See *One Lot Emerald Cut Stones and One Ring v. United States*, 409 U.S. 232, 237 (1972).

105. 372 U.S. 144 (1963).

country to evade military service was punitive in character.¹⁰⁶ In so doing, the Court in *Mendoza-Martinez* provided an analytical framework for determining whether a statute is civil or criminal in nature. The framework involves an examination of several factors: (1) whether the sanction involves an affirmative disability or restraint;¹⁰⁷ (2) whether it historically has been regarded as a punishment;¹⁰⁸ (3) whether it requires a finding of scienter;¹⁰⁹ (4) whether its operation will promote the traditional aims of punishment — retribution and deterrence;¹¹⁰ (5) whether the acts to which it applies are already criminal;¹¹¹ (6) whether, rather than being a punishment, there is an alternative purpose to which it may rationally be connected;¹¹² and (7) whether it appears excessive in light of the alternative purpose as-

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106. *Id.* at 168-69. *Mendoza-Martinez* departed the country in 1942 and remained in Mexico until 1946 when he voluntarily returned to the United States and was convicted of draft evasion. After serving a term in prison, he continued to reside in the United States until 1953, when he was arrested for deportation under the Nationality Act of 1940.
107. *See, e.g.,* *Flemming v. Nestor*, 363 U.S. 603, 617 (1960) (denial of a noncontractual government benefit); *United States v. Lovett*, 328 U.S. 303, 316 (1946) (denial of federal employment); *Ex parte Garland*, 71 U.S. (4 Wall.) 333, 377 (1866) (exclusion from practice of law in the courts of the United States).
108. *See, e.g.,* *Wong Wing v. United States*, 163 U.S. 228, 238 (1896) (imprisonment and hard labor held to be punishment); *Mackin v. United States*, 117 U.S. 348, 350-52 (1886) (same); *Cummings v. Missouri*, 71 U.S. (4 Wall.) 277, 320-21 (1866) (disqualification from lawful vocation as a clergyman held to be punishment).
109. *See, e.g.,* *Child Labor Tax Case*, 259 U.S. 20, 37-38 (1922) (Court determined that a tax on a business utilizing child labor constituted a penalty because the statute used the criteria of wrongdoing. "Scienter is associated with penalties, not taxes."); *Helwig v. United States*, 188 U.S. 605, 610-12 (1903) (where punishment differed according to whether carelessness or fraud was shown, a penalty existed).
110. *See, e.g.,* *Trop v. Dulles*, 356 U.S. 86, 96-97 (1958) (statute taking away citizenship from convicted army deserter serves no other legitimate purpose except punishment); *United States v. Constantine*, 296 U.S. 287, 295 (1935) (because the tax on those in violation of state law was grossly disproportionate to the normal tax, the Court concluded that its primary purpose was punishment).
111. *See, e.g.,* *United States v. Constantine*, 296 U.S. 287, 295 (1935) (state tax conditioned on commission of a crime was penal in nature); *United States v. LaFranca*, 282 U.S. 568, 572-73 (1931) (same); *Lipke v. Lederer*, 259 U.S. 557, 562 (1922) (same).
112. *See, e.g.,* *De Veau v. Braisted*, 363 U.S. 144, 157-60 (1960) (disqualification of ex-felons from holding office in waterfront unions within regulatory power of State to control union racketeering, not additional punishment); *Flemming v. Nestor*, 363 U.S. 603, 612, 617 (1960) (disqualification of specific deportees from eligibility for Social Security benefits while not lawfully in the country held to bear rational relation to the purposes of statute and therefore was not a penalty); *United States v. Doremus*, 249 U.S. 86, 94-95 (1919) (provisions of Narcotic Drug Act for subjecting the sale and distribution of drugs to official supervision and inspection held to have a reasonable relation to enforcement of special tax on sale and distribution of such drugs rather than punishment); *Hawker v. New York*, 170 U.S. 189, 191-93 (1898) (exclusion from practice of medicine following conviction for felony held to be an incident of State's power to protect health and safety, not additional punishment); *Fong Yue Ting v. United States*, 149 U.S. 698, 730 (1893) (deportation held not to constitute punishment for a crime, rather it is a method for returning aliens to their own country when they fail to comply with conditions of residency). *But see* *Lipke v. Lederer*, 259 U.S. 557, 561-62 (1922) (tax is a

signed.¹¹³ In *Mendoza-Martinez*, the Court examined the legislative history of the Nationality Act of 1940 and determined that it was intended to provide additional punishment for draft evaders who fled the country during time of war.¹¹⁴ Since the civil deportation procedures utilized in *Mendoza-Martinez* lacked the procedural safeguards attending proceedings with a punitive object, the Nationality Act was held unconstitutional.¹¹⁵

Although the task of determining the penal nature of the statute in *Mendoza-Martinez* was accomplished by reference to its legislative history, the task is not as simple in examining the nature of the Occupational Safety and Health Act.¹¹⁶ The congressional purpose underlying promulgation of the Act is to assure workers safe and healthful conditions and to encourage employers to reduce occupational and safety hazards by providing for an effective inspection and enforcement program.¹¹⁷ The Act and its legislative history¹¹⁸ do not clearly disclose a congressional intent to punish violators except when an employer willfully or repeatedly violates a health or safety standard and the violation results in the death of an employee.¹¹⁹ In this circumstance, the employer, upon conviction, may be "punished by a fine of not more than \$10,000 or imprisonment not to exceed six months, or both"¹²⁰ Since this provision is clearly penal in character, application of the exclusionary rule for violations of the fourth amendment may be warranted.

As to the civil penalty provisions, however, an analysis of the *Mendoza-Martinez* factors is required to determine whether the provisions are in fact quasi-criminal and thus require the application of the exclu-

penalty when its primary function is to define and suppress crime rather than provide for the support of the government).

113. See, e.g., *United States v. Constantine*, 296 U.S. 287, 295 (1935) (special excise tax of \$1,000 for retail liquor dealers in business contrary to state law, compared with \$25 excise tax for lawful dealers, held to be penal); *Helwig v. United States*, 188 U.S. 605, 610-12 (1903) (an additional duty imposed for undervalued customs declaration greatly exceeded the maximum amount of regular duty and was, therefore, a penalty). But see *Rex Trailer Co. v. United States*, 350 U.S. 148, 154 (1956) (\$2,000 upheld as liquidated damages for fraudulent purchase of war surplus goods when amount was not so unreasonable or excessive as to convert the damages to a penalty).

114. *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 170-74 (1963).

115. *Id.* at 184-86; see also *Trop v. Dulles*, 356 U.S. 86 (1958) (holding that expatriation under the Nationality Act of 1940, as punishment for military deserters in time of war, was cruel and unusual and in violation of the eighth amendment).

116. 29 U.S.C. §§ 651-678 (1976).

117. *Id.* § 651(b)(1), (b)(10).

118. See S. REP. NO. 1282, 91st Cong., 2d Sess. 2, reprinted in 1970 U.S. CODE CONG. & AD. NEWS 5177.

119. 29 U.S.C. § 666(e) (1976).

120. *Id.* Conviction under this section for a second offense may result in a fine of up to \$20,000, one year imprisonment, or both. *Id.* Other criminal sanctions under the Act include punishment for giving advance notice of an OSHA inspection, *id.* (f), and making false statements, reports or certifications in any record, plan or document whose maintenance or filing is required under the plan. *Id.* (g).

sionary rule. Applying the first *Mendoza-Martinez* factor to the OSHA statutory scheme, it is readily apparent that OSHA civil penalty provisions for serious, nonserious,¹²¹ or repeated violations¹²² of the Act may result in an "affirmative disability or restraint," as defined in *Mendoza-Martinez*, since employers are assessed a monetary penalty.

The question of whether the sanction has historically been regarded as punishment is easily resolved because civil monetary penalties are not viewed as punitive when they serve a remedial rather than a punitive function.¹²³ Although imposition of monetary penalties may suggest a punitive purpose, one must examine the structure of the Act to determine whether the primary purpose of the penalties is to impose punishment for violation of the law or is remedial: that is, to encourage compliance with health and safety regulations by providing negative consequences for noncompliance. The Act provides for monetary penalties of up to \$1,000 per violation when employers are cited for serious or nonserious violations of OSHA standards.¹²⁴ Repeated or willful violations of the Act can result in penalties of up to \$10,000 per violation.¹²⁵ From this statutory scheme, one may conclude that the Act's purpose is primarily remedial in nature, encouraging corporate and business employers to comply with health and safety standards by providing negative consequences for the initial failure to comply with the statute and also by providing for the possibility of increased penalties for repeated or willful refusal to rectify violations. While imposition of the monetary penalty might be perceived as punishment for noncompliance, such penalties are clearly incidental to the remedial purposes of assuring "safe and healthful working conditions and to preserve our

121. Serious or nonserious violations of the Act may result in a civil penalty of up to \$1,000 for each violation. See 29 U.S.C. § 666(b), (c) (1976). Moreover, failure to correct a violation for which a citation is issued may result in a fine of up to \$1,000 per day as long as the failure or violation continues. *Id.* (d).

122. A repeated or willful violation of the Act may result in a civil penalty of up to \$10,000 for each violation. *Id.* (a).

123. *Atlas Roofing Co. v. OSHRC*, 518 F.2d 990, 1001 (5th Cir. 1975), *aff'd*, 430 U.S. 442 (1977). The remedial/punitive distinction was delineated in *Trop v. Dulles*, 356 U.S. 86 (1958). In that case, the Court stated:

[A] statute has been considered nonpenal if it imposes a disability, not to punish, but to accomplish some other legitimate governmental purpose. The Court has recognized that any statute decreeing some adversity as a consequence of certain conduct may have both a penal and a nonpenal effect. The controlling nature of such statutes normally depends on the . . . purpose of the legislature. The point may be illustrated by the situation of an ordinary felon. A person who commits a bank robbery, for instance, loses his right to liberty and often his right to vote. If, in the exercise of the power to protect banks, both sanctions were imposed for the purpose of punishing bank robbers, the statutes authorizing both disabilities would be penal. But because the purpose of the latter statute is to designate a reasonable ground of eligibility for voting, this law is sustained as a nonpenal exercise of power to regulate the franchise.

Id. at 96-97.

124. 29 U.S.C. § 666(b), (c) (1976).

125. *Id.* (a).

human resources."¹²⁶

The scienter factor in the *Mendoza-Martinez* test cuts both for and against a finding that OSHA penalties are quasi-criminal. In the case of serious and nonserious violations, the Act only requires noncompliance, not the existence of scienter prior to finding a violation. Although willful violations may suggest a scienter requirement, the definition of willfulness in the context of OSHA violations is not concerned simply with malicious intent by the employer. Rather, the concept of willfulness encompasses an omission or failure to act if done voluntarily and intentionally.¹²⁷ One may conclude, therefore, that OSHA penalties generally do not require scienter.¹²⁸

As to the fourth *Mendoza-Martinez* factor, testing whether the operation of the statute will promote the traditional aims of punishment, one must conclude that OSHA penalties are calculated to achieve both a deterrent and retributive effect. The OSHA scheme assesses penalties in accordance with the relative severity of the violation,¹²⁹ indicating at least a partial retributive purpose. In addition, the penalties may also have a general deterrent effect not only on other employers within the industry, but also on the offending employer. Similarly, OSHA abatement and enforcement orders compel employers to change past behavior and comply with established standards. The penalty and abatement provisions, however, also further a remedial objective which serves to protect workers by encouraging compliance with government regulations. Therefore, under this factor OSHA penalties are not clearly quasi-criminal in nature.

For example, in *Atlas Roofing Co. v. OSHRC*,¹³⁰ the Fifth Circuit held that OSHA penalties are civil in nature and imposition of them does not entitle employers to a jury trial. The court reasoned that the term remedial included the concept of compensatory deterrence and also encompassed "a kind of prospective deterrence of a means to encourage compliance with the government regulation."¹³¹ On appeal, the Supreme Court analyzed the issue in terms of whether adjudication of OSHA civil penalties involved private rights which would entitle

126. See *id.* § 651(b). Moreover, one must consider the relatively modest limits on the penalties when one considers the financial resources of large corporate employers and businesses who violate the prevailing standards. It should be acknowledged, however, that such "modest" financial penalties can have a dramatically different impact on the small business employer subject to OSHA standards.

127. See *Kent Nowlin Const. Co. v. OSHRC*, 593 F.2d 368 (10th Cir. 1979) (voluntary and intentional decision not to comply with OSHA standard was willful despite lack of venal motive); *F.X. Messina Const. Corp. v. OSHRC*, 505 F.2d 701 (1st Cir. 1974) (same). But cf. *Frank Irey, Jr., Inc., v. OSHRC*, 519 F.2d 1200 (3d Cir. 1974), *aff'd*, 519 F.2d 1215 (3d Cir. 1975) (en banc) (more than mere voluntary action or omission is required to constitute willful violation).

128. Cf. *OSHA and the Exclusionary Rule*, *supra* note 14, at 679 (OSHA penalties, with possible exception of willful violations, do not require scienter).

129. See *supra* notes 121-22.

130. 518 F.2d 990 (5th Cir. 1975), *aff'd*, 430 U.S. 442 (1977).

131. 518 F.2d at 1002; see also *supra* note 102.

employers to a jury trial. In affirming the Fifth Circuit, the Supreme Court held that since the government was suing to enforce *public* rights created by statute, an administrative adjudication, without a jury trial, was not prohibited by the seventh amendment.¹³² Thus, OSHA enforcement of public rights utilizing penalties performing both remedial and prospective deterrence functions does not bring the OSHA statute within the purview of being punishment-oriented.

An analysis of the fifth *Mendoza-Martinez* factor, whether the proscribed conduct is already a crime, militates against the proposition that the OSHA enforcement scheme is quasi-criminal. In *One Lot Emerald Cut Stones and One Ring v. United States*,¹³³ the Supreme Court held that Congress can enact both criminal and civil sanctions for the same conduct.¹³⁴ In that case, a lower court's decision imposing forfeiture of illegally imported merchandise was upheld despite criminal acquittal for the same conduct. Central to the Court's analysis was the fact that proof under the forfeiture proceedings did not require a showing of intent to defraud, an essential element under the criminal charge.¹³⁵ The Court also reasoned that the forfeiture was intended to aid in the enforcement of tariff regulations by providing for a form of liquidated damages for violations of the law. Moreover, forfeiture also served to defray the considerable expenses of investigation and enforcement.¹³⁶

OSHA criminal sanctions for violations of the Act are clearly denominated and do not overlap with civil penalty provisions. Section 666(a) provides for fines and imprisonment when an employer willfully violates a standard or regulation that results in an employee's death.¹³⁷ Although section 666(a) provides for a civil penalty in those cases involving willful and repeated violations, this provision does not run afoul of the Court's analysis in *One Lot Emerald* because the criminal sanctions of the Act do not apply unless the willful violation results in

132. 430 U.S. at 449-50. *Cf.* *Muniz v. Hoffman*, 422 U.S. 454, 475-77 (1975) (\$10,000 fine that resulted from a charge of criminal contempt did not trigger right to a jury trial).

133. 409 U.S. 232 (1972).

134. *Id.* at 235-36.

135. *Id.* But *cf.* *One 1958 Plymouth Sedan v. Pennsylvania*, 380 U.S. 693 (1955). In that case the Supreme Court reversed a decision approving civil forfeiture of an automobile which was utilized to transport contraband. Although the criminal prosecution was dismissed because the evidence was seized in violation of the fourth amendment, the state court held that the exclusionary rule did not apply to civil forfeiture proceedings. In reversing, the Supreme Court held that a forfeiture proceeding is quasi-criminal in character because "its object, like a criminal proceeding, is to penalize for the commission of an offense against the law." *Id.* at 700. Unlike *One Lot Emerald*, the evidence necessary to sustain a forfeiture in *Plymouth Sedan* required the same evidence which was illegally seized and excluded in the criminal proceedings. Since the forfeiture was clearly punishment for a criminal offense, the Court held that the exclusionary rule applied.

136. *One Lot Emerald Cut Stones and One Ring v. United States*, 409 U.S. 232, 237 (1972).

137. 29 U.S.C. § 666(a) (1976).

the death of an employee. Hence, the OSHA civil provisions do not penalize behavior which is already a crime because evidence of a criminal violation requires proof of an additional element.

The sixth consideration under the *Mendoza-Martinez* test is whether an alternative purpose other than punishment may be rationally ascribed to the sanction. In setting forth this factor, the Court in *Mendoza-Martinez* cited two prohibition-era cases to illustrate its meaning. Both *United States v. LaFranca*¹³⁸ and *Lipke v. Lederer*¹³⁹ involved imposition of revenue "taxes" for possession and sale of liquor for which the defendants were criminally punished under the National Prohibition Act. In both cases, the Court was unwilling to accept the government's position that the taxes were civil; instead, the Court held that the only rational purpose behind the taxation of illegal liquor under the National Prohibition Act was punishment of a crime.¹⁴⁰

Similarly, in *The Child Labor Tax Case*,¹⁴¹ the Court held that a ten percent excise tax of net profits for violating child labor laws was a penalty rather than a tax. In drawing a distinction between a tax and a penalty, the Court observed:

Taxes are occasionally imposed in the discretion of the legislature on proper subjects with the primary motive of obtaining revenue from them and with the incidental motive of discouraging them by making their continuance onerous. *They do not lose their character as taxes because of the incidental motive.* But there comes a time in the extension of the penalizing features of the so-called tax when it loses its character as such and becomes a mere penalty with the characteristics of regulation and punishment.¹⁴²

Thus, in assessing whether a statute is quasi-criminal, a court is not bound by the stated purpose ascribed by the legislature in promulgating the law. If the law is penal in effect, the courts will not hesitate to reject the legislative label and find the law to be punitive.

The primary purpose of OSHA penalties is remedial rather than punitive. The penalties are designed to effectuate the Act's objective of providing safe and healthy working conditions and to preserve human resources.¹⁴³ While OSHA civil penalties may incidentally deter employers from future OSHA violations, or penalize them for failing to comply in the first instance, the primary objectives of the Act do not

138. 282 U.S. 568 (1931).

139. 259 U.S. 557 (1922).

140. See *United States v. LaFranca*, 282 U.S. 568 (1931); *Lipke v. Lederer*, 259 U.S. 557 (1922). In *LaFranca*, the Court stated that "[n]o mere exercise of the art of lexicography can alter the essential nature of an act or a thing; and if an exaction be clearly a penalty it cannot be converted into a tax by the simple expedient of calling it such." *United States v. LaFranca*, 282 U.S. 568, 572 (1931).

141. 259 U.S. 20 (1922).

142. *Id.* at 38 (emphasis added).

143. See 29 U.S.C. § 651 (1976).

favor a characterization of the penalties as quasi-criminal within the context of *Mendoza-Martinez*.

The final factor under the *Mendoza-Martinez* test is whether the monetary penalty appears excessive in relation to the alternative purpose assigned to it. In *Helwig v. United States*,¹⁴⁴ the Court characterized a customs duty as penal because the statute authorized imposition of an additional duty on the importer for undervaluating a customs declaration. Although the undervaluation was made without intent to defraud, the statute permitted an additional duty of over one-half of the appraised value of the goods.¹⁴⁵ The Court was similarly persuaded of the penal character of a statute when it was confronted with a prohibition-era excise tax in *United States v. Constantine*.¹⁴⁶ The Court in *Constantine* upheld the lower court's finding that an excise tax was penal in character when the government exacted \$1,000 from retail liquor dealers engaged in business contrary to state law and a mere \$25 from dealers operating within the law.¹⁴⁷ The great disparity between excises collected for lawful versus unlawful operations strongly indicated the statute's penal character.¹⁴⁸

Supreme Court precedent appears to support testing for penal sanctions by looking to whether the monetary penalties are grossly disproportionate to the statutory violation as found in *Helwig* and *Constantine*. Because the Act imposes a maximum \$1,000 penalty for nonserious violations¹⁴⁹ there may be some instances when the penalty is excessive in light of the violation. One might be cited for failure to provide a proper toilet seat in restroom facilities and fined the same amount for failure to maintain a safety guard on an industrial machine. If presented with such an absurd disparity, a finding that the civil penalty was penal in nature would be warranted.

As acknowledged by the Supreme Court in *Mendoza-Martinez*, the seven factor balancing test for determining whether a particular set of civil sanctions are penal may point in "differing directions."¹⁵⁰ Application of the *Mendoza-Martinez* factors to a statutory scheme, while relevant to a determination of its character, does not override the general rule that courts will construe statutes by resort to their stated purposes and legislative history.¹⁵¹ Several of the *Mendoza-Martinez* factors, such as the nature of monetary penalties as an affirmative disability, traditional aims of punishment and excessiveness of penalties

144. 188 U.S. 605 (1903).

145. *Id.* at 611.

146. 296 U.S. 287 (1935).

147. *Id.* at 295.

148. *Id.* The Court in *Constantine* was also persuaded by the fact that the precondition for imposition of the excise tax, illegal operation of a retail liquor business, involved commission of a crime. *Id.*

149. 29 U.S.C. § 666(c) (1976).

150. *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 169 (1963).

151. *See Atlas Roofing Co. v. OSHRC*, 518 F.2d 990, 1011 (5th Cir. 1975), *aff'd*, 430 U.S. 442 (1977).

may, in some circumstances, favor the conclusion that OSHA monetary penalties are penal. Viewed in its entirety, however, the OSHA scheme focuses on the health and safety of the American worker, not the punishment of the employer. Although retribution and deterrence may be achieved through imposition of a monetary penalty, such goals are incidental to the Act's primary purpose. Civil penalties for regulatory violations are simply a part of an employer's risk of engaging in a selected enterprise. By imposing different sanctions in the Act, Congress has clearly delineated illegal employer conduct which is criminal and that which is civil. Additionally, the maximum civil monetary penalties are not clearly excessive when compared with the stated legislative purpose.

Thus, the *Savina* court's characterization of OSHA penalties as quasi-criminal does not clearly fall within that category as defined by the Supreme Court in *Mendoza-Martinez*. If the exclusionary rule is to be applied to OSHA proceedings, it should be justified under a different theory. The treatment by OSHRC in *Donovan v. Sarasota Concrete Co.*,¹⁵² of the question of the applicability of the exclusionary rule discloses an attempt to justify adoption of the rule based on principles of judicial integrity and deterrence of official misconduct. Closer examination of the *Sarasota* case is illustrative of the conflict and countervailing policies underlying the decision to apply the exclusionary rule to evidence obtained as a result of illegal OSHA inspections.

B. *Sarasota Concrete Company*

In *Donovan v. Sarasota Concrete Co.*,¹⁵³ OSHRC applied the exclusionary rule to evidence obtained pursuant to an OSHA inspection warrant ruled to be overbroad in scope. OSHA received a complaint from a former employee of the Sarasota Concrete Company regarding alleged safety defects in the company's cement trucks.¹⁵⁴ Several weeks subsequent to the complaint, an OSHA compliance officer requested entry onto the premises for inspections. Pursuant to company policy, he was refused entry without a search warrant.¹⁵⁵ Six and one-half months later, the area director of OSHA obtained an administrative inspection warrant in Florida district court. Although the request for the warrant was based solely on an employee complaint,¹⁵⁶ OSHA

152. 1981 O.S.H. DEC. (CCH) 31,527, *aff'd*, 693 F.2d 1061 (11th Cir. 1982).

153. 1981 O.S.H. DEC. (CCH) 31,527, *aff'd*, 693 F.2d 1061 (11th Cir. 1982).

154. The Act makes provision for a special inspection upon written complaint by employees or their representative of: (1) a violation of a safety or health standard which threatens physical harm; or (2) when an imminent danger exists. 29 U.S.C. § 657(f)(1) (1976). It is notable that the statute does not define the terms inspection or special inspection but delegates the method of conducting inspections to OSHA. See *id.* (f)(2); see also 29 C.F.R. 1903.11 (1982).

155. *Donovan v. Sarasota Concrete Co.*, 1981 O.S.H. DEC. (CCH) 31,527, 31,528, *aff'd*, 693 F.2d 1061 (11th Cir. 1982).

156. The complaint, in pertinent part, provided that "Sarasota has (12) driver-operators exposed to improper maintenance, i.e., worn tires, faulty springs, faulty turn

made application for and received authorization to conduct a full-scope inspection in accordance with OSHA guidelines existing at the time.¹⁵⁷ This type of inspection includes the employer's entire establishment.¹⁵⁸ After the inspection, the company was issued a citation alleging twelve nonserious violations of the Act. Significantly, none of the alleged violations related to the cement trucks or the substance of the employee complaint, and no penalties were assessed.¹⁵⁹ The company filed a timely notice of contest and the case came for hearing before an OSHRC administrative law judge.

At the OSHRC hearing, the company raised a motion to suppress all evidence of violations obtained by OSHA which exceeded the scope of the employee complaint. The administrative law judge held that a warrant issued pursuant to an employee complaint citing specific hazards was insufficient to justify issuance of an authorization to conduct a full-scope inspection extending to areas not specifically mentioned in the complaint.¹⁶⁰ OSHRC, agreeing with the administrative law judge, distinguished inspections initiated at an employee request and those based on a general administrative enforcement scheme. OSHRC held that "where probable cause for an inspection is based solely on specific evidence of an existing violation, to accomodate the [f]ourth [a]mendment the inspection generally should be limited to the alleged violative condition."¹⁶¹

Having determined that the evidence was obtained in violation of the fourth amendment prohibition against overbroad search warrants, OSHRC concluded that application of the exclusionary rule to the illegally obtained evidence was appropriate and necessary to deter unlawful conduct on the part of OSHA officials.¹⁶² OSHRC utilized a balancing test in weighing the potential injury to enforcement of the Act against the potential deterrence of future unlawful conduct by

signals and faulty lights and erratic brakes and steering on [a] major portion of the cement-mixer truck fleet." *Id.*

157. OSHA guidelines authorizing a full-scope inspection were published in OSHA Program Directive #200-69, [1977-78 Transfer Binder] EMPL. SAFETY AND HEALTH GUIDE (CCH) ¶ 11,137, at 12,142. These guidelines have been superseded by a new OSHA instruction providing that compliance inspections in low hazard industries should be limited to the work conditions specified in the employee complaint unless the inspector observes serious hazards while conducting the inspection or becomes aware of other information justifying an expansion of the scope of the search. 29 C.F.R. § 1903 (1982).

158. See OSHA Program Directive #200-69, [1977-78 Transfer Binder] EMPL. SAFETY AND HEALTH GUIDE (CCH) ¶ 11,137, at 12,143. When the complaint alleges serious hazards "if time and resources permit, the inspection should cover not only violations and dangers but the entire establishment of the employer." *Id.*

159. *Donovan v. Sarasota Concrete Co.*, 1981 O.S.H. DEC. (CCH) 31,527, *aff'd*, 693 F.2d 1061, 1064 (11th Cir. 1982).

160. 1981 O.S.H. DEC. (CCH) at 31,535-36.

161. *Id.*

162. *Id.* at 31,531-33. *But cf.* *Donovan v. Federal Clearing Die Casting Co.*, 695 F.2d 1020 (7th Cir. 1982), reh'g denied *en banc*, Apr. 14, 1983 (suggests exclusionary rule is inapplicable to OSHA proceedings). See *supra* note 230 for a further discussion of *Federal Clearing*.

OSHA investigators.¹⁶³ OSHA argued that application of the exclusionary rule was unnecessary because OSHA inspectors did not utilize coercion or force in effecting entry into the commercial premises.¹⁶⁴ Therefore, the need for deterrence provided by the exclusionary rule was reduced in the context of an OSHA civil proceeding. It was also argued that the exclusionary rule should not be applied in the civil context when the government does not seek criminal sanctions but pursues compliance with civil obligations. Rejecting both arguments, OSHRC stated:

[W]e conclude that the Court's decision in *Barlow's* stands for the proposition that an employer's right to be free of unreasonable searches and seizures by OSHA inspectors is a right that merits protection. The need for deterrence of unlawful government searches and seizures is similar regardless of the civil or criminal characterization of the anticipated penalties. To adopt the civil/criminal distinction suggested by the Secretary would create the anomalous situation 'that a man suspected of a crime has a right to protection against search . . . without a warrant, [while] a man not suspected of a crime has no such protection.'¹⁶⁵

OSHRC also held that application of the exclusionary rule would have "an appreciable deterrent effect" on OSHA inspectors based on the fact that the Secretary may issue and enforce guidelines to effectuate OSHRC decisions regarding fourth amendment violations.¹⁶⁶

OSHRC also rejected the argument that illegally obtained evidence of OSHA violations should not be suppressed if the official misconduct falls into the good faith exception to the exclusionary rule, as enunciated by the Fifth Circuit in *United States v. Williams*.¹⁶⁷ Without analysis of the *Williams* decision, OSHRC concluded that "the ultimate issue is not the Secretary's good faith, but whether the Secretary lawfully obtained the evidence under the [f]ourth [a]mendment."¹⁶⁸ The Commission perceived OSHA as attempting to defend unconstitu-

163. *Donovan v. Sarasota Concrete Co.*, 1981 O.S.H. DEC. (CCH) 31,527, 31,531-33, *aff'd*, 693 F.2d 1061 (11th Cir. 1982).

164. 1981 O.S.H. DEC. (CCH) at 31,531-33. *See* 29 C.F.R. § 1903.4 (1982) (inspectors are required to request permissive entry, and upon refusal withdraw to consult supervisors with the option of obtaining a warrant).

165. *Donovan v. Sarasota Concrete Co.*, 1981 O.S.H. DEC. (CCH) 31,527, 31,532, *aff'd*, 693 F.2d 1061 (11th Cir. 1982).

166. 1981 O.S.H. DEC. (CCH) at 31,532.

167. 622 F.2d 830 (5th Cir. 1980) (en banc) (per curiam), *cert. denied*, 449 U.S. 1127 (1981).

168. *Donovan v. Sarasota Concrete Co.*, 1981 O.S.H. DEC. (CCH) 31,527, 31,533, *aff'd* 693 F.2d 1061 (11th Cir. 1982). The Commission dismissed the discussion of the good faith exception in *Williams* as an alternative holding "of questionable precedential value" because only "[t]welve judges of a twenty-four judge panel joined. . . ." 1981 O.S.H. DEC (CCH) at 31,533 n.10. A plain reading of the *Williams* decision reveals, however, that the court was not speaking in dictum and that thirteen judges joined in the majority opinion.

tional inspections by the assertion that they executed the warrant in good faith compliance with existing administrative guidelines, and that any defect was a product of the magistrate's error.¹⁶⁹ OSHRC held, therefore, that it is incumbent on the Secretary to limit the scope of the warrant to the matters specified in the employee complaint or the inspection will be held invalid and the evidence obtained will be suppressed in subsequent administrative proceedings.¹⁷⁰ Analysis of the competing policies and values underlying the fourth amendment and application of the exclusionary rule, however, suggest a contrary conclusion.

C. *Applicability of The Exclusionary Rule*

In *Donovan v. Sarasota Concrete Co.*,¹⁷¹ OSHRC relied on the discarded theory of judicial integrity¹⁷² and deterrence of police misconduct to reach its conclusion that the exclusionary rule applied to OSHA proceedings. OSHRC also apparently accepted the dictum by the Third Circuit in *Babcock and Wilcox Co. v. Marshall*¹⁷³ stating that OSHRC could "decide, independently of any decision by the federal courts as to the applicability of the exclusionary rule to administrative proceedings, to apply the rule as a matter of its own policy pursuant to its supervisory authority over the Act's enforcement."¹⁷⁴

The notion that the supervisory power of federal courts extends to suppression of otherwise admissible evidence illegally seized from a third party not before the court was rejected by the Supreme Court in

169. OSHRC noted that the warrant in *Sarasota* paraphrased the language set forth in the warrant application. Thus, OSHRC stated that "the Secretary cannot defend against a charge of unconstitutional conduct by asserting that his officials *executed* the warrant in good faith and that any defect was in the magistrate's error." *Donovan v. Sarasota Concrete Co.*, 1981 O.S.H. DEC. (CCH) 31,527, 31,533 (emphasis added), *aff'd*, 693 F.2d 1061 (11th Cir. 1982). OSHRC apparently did not appreciate the distinction between *execution* of a search warrant and the good faith belief in the existence of probable cause in applying for a search warrant. Such distinction is critical in testing for probable cause. See *Spinelli v. United States*, 393 U.S. 410 (1969); *Aguilar v. Texas*, 378 U.S. 108 (1964). The fact that the language utilized by the magistrate in the warrant paraphrased that contained in the application to search is irrelevant because the test for probable cause turns on whether the warrant, standing alone, meets the *Aguilar-Spinelli* test.

170. *Donovan v. Sarasota Concrete Co.*, 1981 O.S.H. DEC. (CCH) 31,527, 31,533, *aff'd*, 693 F.2d 1061 (11th Cir. 1982).

171. 1981 O.S.H. DEC. (CCH) 31,527, *aff'd*, 693 F.2d 1061 (11th Cir. 1982).

172. See *United States v. Janis*, 428 U.S. 433 (1976). There it was stated: "the Court, however, has established that the prime purpose of the [exclusionary] rule, if not the sole one, 'is to deter future unlawful police conduct.'" *Id.* at 446 (citing *United States v. Calandra*, 414 U.S. 338, 347 (1974)). The Court in *Janis* criticized *United States v. Chase*, 67-1 U.S. TAX CAS. (CCH) ¶ 15,733, 84,744 (1966), in which the district court relied entirely upon principles of judicial integrity in excluding from a tax proceeding evidence constitutionally seized by state agents. *United States v. Janis*, 428 U.S. 433, 457 n.34 (1976).

173. 610 F.2d 1128 (3d Cir. 1979).

174. *Id.* at 1139.

United States v. Payner.¹⁷⁵ The Court in *Payner* disapproved the suppression of evidence when the defendant's own constitutional rights were not violated because "unbending application of the exclusionary sanction to enforce ideals of governmental rectitude would impede unacceptably the truth-finding functions of judge and jury. After all, it is the defendant, and not the constable, who stands trial."¹⁷⁶ Thus, the Court concluded that the standard for imposition of the exclusionary rule is identical whether courts elect to analyze the issue under their supervisory power or under fourth amendment principles.¹⁷⁷

While OSHRC may possess a type of supervisory authority,¹⁷⁸ it is plain that it may not disregard the limitations of the statute it is charged to enforce.¹⁷⁹ Since the Act does not explicitly authorize OSHRC to promulgate rules of evidence not required by the Constitution, OSHRC's adoption of the exclusionary rule for purposes of ensuring judicial integrity or in the exercise of its supervisory authority is *ultra vires*.

Reliance by OSHRC on the theory of deterrence of police misconduct to justify application of the exclusionary rule to evidence obtained by illegally conducted OSHA inspections is similarly misplaced. In *United States v. Calandra*,¹⁸⁰ the Supreme Court, although speaking to the narrower issue of whether the exclusionary rule applied to grand jury proceedings, established the parameters for application of the rule:

Despite its broad deterrent purpose, the exclusionary rule has never been interpreted to proscribe the use of illegally seized evidence in all proceedings or against all persons. As with any remedial device, the application of the rule has been restricted to those areas where its remedial objectives are thought most efficaciously served. The balancing process im-

175. 447 U.S. 727 (1980).

176. *Id.* at 734.

177. *Id.* The Court observed that to allow use of the supervisory authority to suppress gross illegalities not infringing a defendant's constitutional rights would permit federal courts to exercise a "standardless discretion" in their application of the exclusionary rule. *Id.* at 737.

178. The Commission is authorized to promulgate rules for the orderly transaction of its own proceedings, 29 U.S.C. § 661(f) (1976), which are held for the purpose of adjudication of contested citations. *See id.* §§ 651(b)(3), 659(c), 661. The Commission, pursuant to *id.* § 661(h), was granted the same investigatory powers as that of the National Labor Relations Board. *Id.* § 161. This gives the Commission the right to require, via subpoena, the attendance of witnesses for live testimony. By regulation, OSHRC has adopted the rules of evidence applicable in the federal district courts. 29 C.F.R. § 2200.72 (1982).

179. The supervisory authority of federal courts "is a complement, not a substitute, for the [f]ourth [a]mendment. Application of the supervisory power is limited to situations where there has been a fraud upon the court in addition to a violation of the defendant's rights." *United States v. Cortina*, 630 F.2d 1207, 1216 (7th Cir. 1980); *see United States v. Russell*, 411 U.S. 423, 435 (1973) (federal supervisory power does not give judiciary a "chancellor's foot" veto over law enforcement practices of which it does not approve).

180. 414 U.S. 338 (1974).

PLICIT in this approach is expressed in the contours of the standing requirement. Thus, *standing to invoke the exclusionary rule* has been confined to situations where the Government seeks to use such evidence to incriminate the victim of the unlawful search This standing rule is premised on a recognition that the need for deterrence and hence the rationale for excluding the evidence are strongest where the Government's unlawful conduct would result *in imposition of a criminal sanction on the victim of the search*.¹⁸¹

This analysis of standing applies with equal force to OSHA inspections. If the primary purpose of the intrusion into an employer's premises is to conduct a statutorily authorized inspection to ensure compliance with existing health and safety regulations, rather than to discover evidence of criminal violations, then a fortiori employers do not possess standing to invoke the exclusionary sanction for violations of the fourth amendment. Authority for this position may be found in *Franks v. Delaware*,¹⁸² where the Court expressed "deep skepticism . . . as to the wisdom of extending the exclusionary rule to collateral areas such as civil or grand jury proceedings" ¹⁸³

Similarly, in *United States v. Janis*¹⁸⁴ the Court declined application of the exclusionary rule to federal civil tax proceedings for evidence obtained by state criminal law enforcement agents in good faith reliance on a warrant which later proved to be defective. Citing *Calandra* with approval, the *Janis* Court observed that "[i]n the complex and turbulent history of the rule, the Court never has applied it to exclude evidence from a civil proceeding, federal or state."¹⁸⁵ In balancing the need for deterrence of inter-sovereign violations of the fourth amendment by criminal law enforcement officers against the societal cost of exclusion, the Court concluded that extension of the rule was unjustified.¹⁸⁶

In a footnote, the Court in *Janis* acknowledged that some lower federal courts had applied the exclusionary rule in civil proceedings.¹⁸⁷

181. *Id.* at 348 (emphasis added); see *Brown v. United States*, 411 U.S. 223 (1973); *Alderman v. United States*, 394 U.S. 165 (1969); *Wong Sun v. United States*, 371 U.S. 471 (1963); *Jones v. United States*, 362 U.S. 257 (1960).

182. 438 U.S. 154 (1978).

183. *Id.* at 171.

184. 428 U.S. 433 (1976).

185. *Id.* at 457.

186. *Id.* at 459-60. The Court also decided *Stone v. Powell*, 428 U.S. 465 (1976), in the same term as *Janis*. In *Stone*, the Court refused to apply the exclusionary rule to claims of fourth amendment violations when the defendant was afforded an opportunity to fully and fairly litigate his fourth amendment claims in state court. The *Stone* Court emphasized that despite its broad deterrent purpose, the exclusionary rule has never been interpreted to proscribe the introduction of all illegally seized evidence in all proceedings or against all persons. *Id.* at 486. It was observed that "although the rule is thought to deter unlawful police activity . . . , if applied indiscriminately it may well have the opposite effect of generating disrespect for the law and administration of justice." *Id.* at 491.

187. *United States v. Janis*, 428 U.S. 433, 455 n.30 (1976).

Examination of the cases cited for that proposition, however, indicates that they can be harmonized with the deterrence rationale underlying the exclusionary rule. Of those cases cited, the *Janis* Court expressly disapproved the reasoning of the tax court in *Suarez v. Commissioner*.¹⁸⁸ In *Suarez*, the tax court applied the exclusionary rule to inter-sovereign violations of the fourth amendment for the protection of the individual and to preserve confidence in the processes of government.¹⁸⁹ Because the tax court did not properly focus on the deterrent purpose of the exclusionary rule, the *Janis* Court refused to consider the *Suarez* case as persuasive.¹⁹⁰

*Pizzarello v. United States*¹⁹¹ was also cited as support for the application of the exclusionary rule to civil proceedings. *Pizzarello* involved an action by a taxpayer to enjoin collection of unpaid wagering taxes on money illegally seized by Treasury agents. Although the Second Circuit suppressed the illegally seized evidence, the value of *Pizzarello* as precedential support is doubtful because the evidence suppressed was also evidence of criminal activity.¹⁹² Similarly, in *Powell v. Zuckert*,¹⁹³ the exclusionary rule was applied in discharge proceedings of an Air Force civilian employee whose off-base home was searched by American and Japanese law enforcement agents for illegal possession of United States government property.¹⁹⁴ *Pizzarello* and *Powell* can be harmonized with the standing requirement of *Calandra* in that the civil proceedings followed illegal conduct by government agents seeking to obtain evidence for imposition of criminal sanctions. Thus, deterrence of police misconduct could be achieved by application of the exclusionary sanction.

In *Knoll Associates Inc. v. FTC*,¹⁹⁵ an additional case cited by the *Janis* Court, the same deterrence rationale was employed when the FTC sought to enforce the Clayton Act by utilizing documents stolen by an unfaithful employee of Knoll Associates. Because the larceny of

188. 58 T.C. 792 (1972).

189. *Id.* at 805-06.

190. *United States v. Janis*, 428 U.S. 433, 457 (1976). The Court specifically noted in the text of their opinion that *Suarez* was not appealed. *Id.* The Court also criticized the failure of the tax court to distinguish between inter-sovereign and intra-sovereign uses of unconstitutionally seized evidence. The Court indicated that the deterrent purposes of the exclusionary rule are best served when the punishment of exclusion is imposed upon the law enforcement officers of the sovereign whose criminal laws have been violated. See *Elkins v. United States*, 364 U.S. 206 (1960). The deterrent purpose of exclusion is further "attenuated" when the proceeding is to "enforce *only* the civil law of the other sovereign." *United States v. Janis*, 428 U.S. 433, 458 (1976).

191. 408 F.2d 579 (2d Cir.), *cert. denied*, 396 U.S. 986 (1969).

192. 408 F.2d at 581 n.4.

193. 366 F.2d 634 (D.C. Cir. 1966).

194. *Id.* at 639-41. *Cf.* *United States v. Stonehill*, 274 F. Supp. 420 (S.D. Cal. 1967) (seizure of documents by Filipino agents held admissible since U.S. agents did not request or participate in raid), *aff'd*, 405 F.2d 738 (9th Cir. 1968), *cert. denied*, 395 U.S. 960 (1969).

195. 397 F.2d 530 (7th Cir. 1968).

the documents occurred with the knowledge of the FTC representatives, for the express purpose of aiding them in their enforcement activity, the Seventh Circuit held that the exclusionary sanction applied.¹⁹⁶ *Knoll* is unique, however, in that it involved a flagrant violation of the fourth amendment by regulatory agency officials seeking evidence of purely civil misconduct. It may be argued that when, as in *Knoll*, government officials become accessories to a crime, the supervisory authority of federal courts is properly exercised since there has been a willful disobedience of the law resulting in a violation of the defendant's constitutional rights.¹⁹⁷

Thus, the line of cases cited in *Janis*¹⁹⁸ as supporting the application of the exclusionary rule in civil proceedings may be harmonized with the standing requirement for the rule's application. The composite view of these cases, in light of the purposes and policies underlying the exclusionary rule, suggests an approach which excludes illegally obtained evidence in civil proceedings: (1) when the search and seizure is conducted by law enforcement officials searching for evidence of *criminal* activity; or (2) when government officials willfully commit, encourage, or knowingly acquiesce to commission of a *crime* in order to obtain evidence of civil violations.

V. APPLYING THE EXCLUSIONARY RULE: THE ARGUMENTS

In determining whether the exclusionary rule applies to OSHA proceedings, it is apparent from the discussion of the rule and the anal-

196. *Id.* at 535-36. *Cf.* *Burdeau v. McDowell*, 256 U.S. 465 (1921) (holding that unsolicited seizure of criminal evidence by a private citizen was not governmental action and protections of fourth amendment were therefore inapplicable).

197. *See, e.g.*, *United States v. Payner*, 447 U.S. 727, 735 n.7 (1980); *McNabb v. United States*, 318 U.S. 332, 345 (1943).

198. Other cases noted by the Court as apparently supportive of applying the exclusionary rule in civil proceedings included: *Anderson v. Richardson*, 354 F. Supp. 363 (S.D. Fla. 1973) (statements made by taxpayers after being subjected to illegal search and seizure and custodial interrogation by police could not form basis for jeopardy assessment by IRS); *Iowa v. Union Asphalt & Road oils, Inc.*, 281 F. Supp. 391 (S.D. Iowa 1968), *aff'd sub nom. Standard Oil Co. v. Iowa*, 408 F.2d 1171 (8th Cir. 1969) (illegally seized evidence in antitrust investigation may be subject to suppression by defendant whose rights are violated unless independent source can be established; question of whether rule applies in civil suits not squarely addressed by court); *United States v. Blank*, 261 F. Supp. 180 (N.D. Ohio 1966) (suppression of evidence warranted in tax assessment proceeding when IRS agents conducted illegal search of taxpayer's home for evidence of crime); *Lasoff v. Gray*, 207 F. Supp. 843 (W.D. Ky. 1962) (suppression of evidence warranted when IRS agents conducted illegal search of taxpayer's home for evidence of wagering); *cf.* *United States v. Stonehill*, 274 F. Supp. 420 (S.D. Cal. 1967), *aff'd*, 405 F.2d 738 (9th Cir. 1968), *cert. denied*, 395 U.S. 960 (1969) (documents seized by Filipino law enforcement agents held admissible since U.S. agents did not request raid or participate in seizure which would have violated fourth amendment). *Contra* *Rogers v. United States*, 97 F.2d 691 (1st Cir. 1938).

ysis of *United States v. Janis*¹⁹⁹ and *United States v. Calandra*²⁰⁰ that the Supreme Court will utilize a test which balances the government's interest in admission of the evidence against the fourth amendment interests violated.²⁰¹ Sound arguments may be advanced on either side. On one hand, employers may argue that *Marshall v. Barlow's, Inc.*²⁰² clearly held that the fourth amendment protected the workplace of employers against warrantless intrusions by government inspectors. Indeed, the right of the people to be secure from unreasonable searches was one of the root causes of the American revolution.²⁰³ If fourth amendment interests of employers are to be adequately protected from government inspectors, the exclusionary rule exists as the only realistic deterrent since it will effectively deprive the government of the incentive to violate the fourth amendment by depriving them of the use of their ill-gotten gains.²⁰⁴

The government, on the other hand, may contend that standing to apply the rule exists *only* when criminal or quasi-criminal punishment will be imposed on the victim of the unconstitutional conduct. Moreover, the societal costs of applying the exclusionary rule far outweigh the benefits of deterrence of official misconduct. Indeed, Congress enacted OSHA precisely because the lives of American workers were being needlessly lost as a result of unsafe and unhealthy workplaces. Prior to passage of OSHA, the Senate Committee on Labor and Public Welfare reported that:

The problem of assuring safe and healthful workplaces . . . ranks in importance with any that engages the national attention today . . . 14,500 people are killed annually . . . as a result of industrial accidents Vast resources that could be available for productive use are siphoned off to pay workmen's compensation benefits and medical expenses.²⁰⁵

To exclude probative and relevant evidence of employer health and safety violations would frustrate congressional intent and jeopardize the lives of workers who would otherwise receive the benefits afforded by OSHA enforcement.

In balancing the competing interests at stake several factors need to be examined. Initially, the "victim" of the unconstitutional conduct

199. 428 U.S. 433 (1976).

200. 414 U.S. 338 (1974).

201. *Accord Note, The Applicability of the Exclusionary Rule in Administrative Adjudicatory Proceedings*, 66 IOWA L. REV. 341, 344-45 (1981).

202. 436 U.S. 307 (1978).

203. See Dickenson, *Writs of Assistance as a Cause of the Revolution*, THE ERA OF THE AMERICAN REVOLUTION 40-75 (Morris ed. 1939).

204. In *Elkins v. United States*, 364 U.S. 206 (1960), the Court stated: "The rule is calculated to prevent, not to repair. Its purpose is to deter—to compel respect for the constitutional guaranty in the only effective available way—by removing the incentive to disregard it." *Id.* at 217. *But see supra* note 76.

205. S. REP. NO. 1282, 91st Cong., 2d Sess. 2, *reprinted in* 1970 U.S. CODE CONG. & AD. NEWS 5177, 5178.

should be identified. In the criminal context, the victim of an illegal search is an individual whose liberty interests are endangered by the illegal acquisition of evidence. In contrast, the corporate or small business employer is a noncorporeal entity whose individual liberty is not threatened by governmental action.²⁰⁶ Therefore, both are afforded fourth amendment protection, but the exclusionary sanction should be applied only when an *individual's* liberty or property interests are placed in jeopardy.

The nature of the search and its situs should also be considered in assessing the need for employer protection against fourth amendment violations. The location of OSHA searches is the American workplace and not the individual's home. While the Court in *Barlow's* made it clear that workplaces are protected by the fourth amendment, its analysis does not compel the conclusion that the exclusionary sanction should be mechanically applied. A common sense application of fourth amendment principles calls for a balancing of interests which recognize that an individual's expectation of privacy in his person and residence is entitled to greater constitutional protection than that of the semi-public workplace.²⁰⁷ Moreover, OSHA inspection procedures do not permit a forceful or surreptitious entry into the business premises, but require application to the courts for a warrant or order.²⁰⁸ Such a requirement does not exist in the criminal context where resisting a properly served warrant will most certainly involve a physical encounter with law enforcement agents in search of criminal evidence which can be easily concealed or destroyed.²⁰⁹

The final argument militating against a strict application of the exclusionary rule in OSHA civil enforcement proceedings occurs when OSHA officials seek and execute an administrative search warrant in good faith. The fruits of the inspection should not be suppressed since the deterrent purpose of the exclusionary rule cannot be achieved by excluding evidence which was acquired in the good faith belief that the warrant was issued on probable cause.

A. *The Good Faith Exception*

If the courts reject the broad proposition that standing to invoke the exclusionary rule in civil proceedings does not exist absent a search for evidence of criminal activity or a willful disobedience of the law by

206. In referring to liberty interests, one must distinguish between the liberty of an individual against restraint or deprivation of his physical freedom and the liberty interests of a business or corporation to pursue its legitimate business activities. See NOWAK, ROTUNDA, & YOUNG, CONSTITUTIONAL LAW 483 (1978). See generally Monaghan, *Of "Liberty" and "Property,"* 62 CORNELL L. REV. 405, 411-16 (1977).

207. See *Salvucci v. United States*, 448 U.S. 83 (1980); *Dunaway v. New York*, 442 U.S. 200 (1979); *Rakas v. Illinois*, 439 U.S. 128 (1978); *Brown v. Illinois*, 422 U.S. 590 (1975); *Terry v. Ohio*, 392 U.S. 1 (1968).

208. See 29 C.F.R. § 1903.4 (1982).

209. See 18 U.S.C. § 3109 (1976).

government officials, serious consideration should be given to recognition of the good faith exception to the rule as delineated in *United States v. Williams*.²¹⁰ OSHRC's position in *Donovan v. Sarasota Concrete Co.*²¹¹ illustrates how the good faith exception would operate.

At the time of the *Sarasota* inspection, OSHA's administrative guidelines permitted a full-scope inspection based on an employee complaint,²¹² and courts which had considered the issue had reached conflicting conclusions.²¹³ Therefore, OSHA's inspectors obtained a warrant in accordance with existing administrative guidelines that had not been definitively struck down. Clearly, if officers or administrative officials obtain a warrant in good faith and the warrant later proves defective, the suppression of the evidence fails to preserve the legitimate objective of deterring illegal conduct.

A policy argument against application of the good faith exception to the exclusionary rule for OSHA inspections can be made because all nonconsensual searches are conducted after issuance of a warrant. In *Sarasota*, OSHRC was concerned that the application for the warrant and the warrant as issued were identical, thus raising the spectre of magistrates "rubber-stamping" requests for search warrants from OSHA inspectors without independently examining them. Indeed, once the warrant is issued and the inspection conducted, good faith could cover a multitude of constitutional "sins." Employers who wish to attack the validity of a warrant would then be confronted with the unenviable position of having to refuse the attempted entry by OSHA inspectors and face contempt proceedings.²¹⁴ If serious violations do

210. 622 F.2d 830 (5th Cir. 1980) (en banc) (per curiam), *cert. denied*, 449 U.S. 1127 (1981). At least one court has held that the reasoning in *Williams* is "equally applicable to civil OSHA enforcement proceedings." *Robberson Steel Co. v. OSHRC*, 645 F.2d 22, 22 (10th Cir. 1980).

211. 1981 O.S.H. DEC. (CCH) 31,527, *aff'd*, 693 F.2d 1061 (11th Cir. 1982).

212. See OSHA Program Directive #200-69, [1977-78 Transfer Binder] EML. SAFETY AND HEALTH GUIDE (CCH) ¶ 11,137, at 12,142.

213. *Compare* *Marshall v. Seaward Int'l, Inc.*, 510 F. Supp. 314 (W.D. Va. 1980), *aff'd*, 644 F.2d 880 (4th Cir. 1981) (upholding validity of full-scope inspection in response to employee complaint) *and In re J.R. Simplot Co.*, 640 F.2d 1134 (9th Cir. 1981) (same) *and* *Burkhart-Randall Div. of Textron, Inc. v. Marshall*, 625 F.2d 1313 (7th Cir. 1980) (same) *with* *Marshall v. North Am. Car Co.*, 626 F.2d 320 (3d Cir. 1980) (upholding, in part, that scope of employee complaint inspections should bear some relationship to violations alleged in complaint) *and* *Marshall v. Central Mine Equip. Co.*, 608 F.2d 719 (8th Cir. 1979) (same, in dictum).

214. Employers who have been recently inspected or who believe they are the target of harassment may seek to enjoin the issuance of a warrant. In *Dravo Corp. v. Marshall*, 5 O.S.H. CAS. (BNA) 2057 (1977), *aff'd mem.*, 578 F.2d 1373 (3d Cir. 1978), the employer was subjected to 24 inspections in seven years as compared to between one and three inspections for his competitors. *Id.* at 2059 n.3. The Court in *Dravo* rejected claims of selective and vindictive enforcement of the Act, since the bulk of the inspection and enforcement activity was initiated not by OSHA but by union employee complaints. *Id.* at 2059. Other employers have raised claims of harassment in a variety of circumstances with a variety of results. See, e.g., *Marshall v. Weyerhaeuser Co.*, 456 F. Supp. 474 (D.N.J. 1978) (information concerning 1974 violations insufficient to establish probable cause to issue a warrant in

exist within the workplace, or indeed, if the employer simply wishes to exercise his fourth amendment rights against what is perceived to be an unreasonable search, then his tactical position is greatly enhanced by refusing entry to the inspector, moving to quash the warrant, and risking contempt proceedings if his motion to quash proves unsuccessful.²¹⁵ If an employer permits the inspection, however, it is still possible to attempt to protest an illegal inspection by seeking a court's injunction of the enforcement activity. That option may be foreclosed, however, by the doctrine of exhaustion of administrative remedies²¹⁶ and the fact that the evidence will not be suppressed even if the employer's claims are successful on appeal. Thus, employers are encouraged to defy the authority of federal courts to order inspection of their premises so that they may preserve their constitutional claims.²¹⁷

1977); *Weyerhaeuser Co. v. Marshall*, 452 F. Supp. 1375 (E.D. Wisc. 1978) (employee complaint merely paraphrasing regulations insufficient to establish probable cause to issue a warrant), *aff'd*, 592 F.2d 373 (7th Cir. 1979); *Continental Can Co. v. Marshall*, 455 F. Supp. 1015 (S.D. Ill. 1978) (citations for violation of noise level against each of plaintiff's 80 plants, had to be consolidated), *aff'd*, 603 F.2d 590 (2d Cir. 1979).

215. One commentator suggests this exact strategy and urges employers to adopt an adversarial stance in virtually *all* dealings with OSHA inspectors. Moran, *Employer Protection Against the Hazards of an OSHA Inspection*, 1981 DIRECTION 25 (available from the National Moving and Storage Association).

This was a successful trial strategy in *Marshall v. Barlow's, Inc.*, 436 U.S. 307 (1978); see also *Donovan v. Federal Clearing Die Casting Co.*, 655 F.2d 793 (7th Cir. 1981) (newspaper report of industrial accident coupled with five-year-old OSHA citation does not constitute probable cause and employer's contempt conviction reversed); *Marshall v. Horn Seed Co.*, 647 F.2d 96 (10th Cir. 1981) (failure by OSHA to show existence of probable cause on basis of employee complaint justified quashing warrant and dismissing contempt proceedings); *Marshall v. Reinhold Constr., Inc.*, 441 F. Supp. 685 (M.D. Fla. 1977) (probable cause did exist for issuance of warrant, but as to contempt proceedings *Rheinhold* was not in contempt because of good faith opposition to the order and obedience to a subsequently issued administrative search warrant).

216. *But cf.* *Weyerhaeuser Co. v. Marshall*, 452 F. Supp. 1375 (E.D. Wisc. 1978) (issuance of injunction prohibiting enforcement activity stemming from illegal inspection conducted under protest; exhaustion of administrative remedies not required), *aff'd*, 592 F.2d 373 (7th Cir. 1979). See generally Rader, Lewis, & Ehlke, *OSHA Warrants and the Exhaustion Doctrine: May the Occupational Safety and Health Review Commission Rule on the Validity of Federal Court Warrants?*, 84 DICK. L. REV. 567 (1980); Note, *Exhaustion of Administrative Remedies Required When Company Challenges Constitutionality of OSHA Inspection Warrant*, 11 SETON HALL L. REV. 56 (1980).

This option, of obtaining an injunction to prevent enforcement activity, may also be precluded if the courts apply the good faith exception in testing for irreparable injury. If the inspection was done in good faith and the evidence is admissible, no injury has been done to the employer.

217. See *Donovan v. Dewey*, 452 U.S. 594 (1981). In the context of the Mine Safety and Health Act, 30 U.S.C. § 813 (1976 & Supp. V 1981), the Court held that mine operators could protect special privacy interests by refusing entry to mine inspectors. The inspectors are then required to file a civil action in federal court to obtain an injunction against future refusals. Such a proceeding provides mine owners with an adequate forum to show that a specific search was outside the regulatory authority of the Act. *Donovan v. Dewey*, 452 U.S. 594, 604-05 (1981).

Even though such arguments possess merit, it is questionable whether they rise to a level requiring application of the exclusionary rule. In making such difficult tactical decisions regarding their legal position, employers are simply called upon to make a management decision which entails a certain set of risks and adverse consequences. Moreover, employers are not left completely defenseless against the OSHA inspector. When faced with frequent general schedule inspections or numerous employee complaint inspections which indicate a pattern of harassment or bad faith, the employer should give serious consideration to refusing entry to OSHA inspectors.²¹⁸ Similarly, if an employer can demonstrate a pattern of abuse of the general regulatory inspection scheme, a sympathetic court may be inclined to enjoin further inspection and enforcement activities by OSHA.

B. A New Argument

One argument that has not been advanced against imposition of the exclusionary sanction is that it is premature to apply the "capital punishment" of the rule to OSHA inspections because of the relative youth and "growing pains" of a regulatory program and agency established only twelve years ago. Other options exist to resolve the problems of unconstitutional inspections in the form of legislation²¹⁹ or OSHA rulemaking.

Although widespread criticism has been leveled at OSHA for its inspection procedures, the agency has recently indicated a responsiveness to those concerns. In February of 1982, OSHA promulgated complaint processing procedures which will serve to eliminate the scope

218. One commentator has emphasized the importance of maintaining a cordial relationship between the employer and the OSHA inspector because of the "great degree of administrative discretion" involved in the inspection, citation, penalty-assessment and abatement functions performed by OSHA inspectors. Rothstein, *OSHA Inspections After Marshall v. Barlow's, Inc.*, 1979 DUKE L.J. 63. Even so, the author indicates that obvious abuses should not be tolerated by employers. *Id.*

219. The Occupational Safety and Health Improvements Acts of 1980, S. 2153, 96th Cong., 2d Sess. were introduced by Senator Schweiker and sought to amend the Act by concentrating enforcement activities in high-hazard workplaces and by encouraging self-initiative in improving occupational safety and health. Although the bill did not pass into law, OSHA subsequently changed inspection procedures to parallel some of Senator Schweiker's proposals and initiated a change in its procedures by OSHA Program Directive CPL 2.25B (Oct. 1, 1981) (available from OSHA Office of Information and Consumer Affairs). In pertinent part, the general schedule inspection procedures provide for the OSHA inspector to initially examine an employer's injury-rate records. If it appears that the workplace injury rate is below the most recently published Bureau of Labor Statistics on lost work-day rates for that industry, the inspector will not conduct a further investigation unless the injury data suggests a particular problem with a specific production process or workplace area. See also *Occupational Safety and Health Improvements Acts of 1980, Hearings on S.2153 Before the Comm. on Labor and Human Resources*, 96th Cong., 2d Sess. 30 (1980).

issues raised in *Donovan v. Sarasota Concrete Co.*²²⁰ New OSHA procedures provide that employee complaint inspections in low hazard industries should be limited in scope unless the inspector observes serious hazards or receives objective injury rate data which, after consulting OSHA's area director, would justify an expanded inspection.²²¹

In addition, court decisions can provide OSHA with direction and guidance as to those inspection practices which are technically unconstitutional but do not necessitate imposition of the exclusionary sanction.²²² For example, the Supreme Court, in *Wolf v. Colorado*,²²³ refused to expand the application of the exclusionary rule of *Weeks v. United States*²²⁴ to the states because other potential sanctions, in the form of civil damage actions and criminal penalties against law enforcement officials, were available.²²⁵ If a widespread pattern of abuse and harassment emerges, then the judiciary may properly apply the ultimate sanctions of the exclusionary rule.

Undoubtedly there are those who will reject this argument on grounds that it grants the employers the right to freedom from unreasonable fourth amendment intrusions but "in reality . . . withhold[s] its privilege and enjoyment."²²⁶ The argument that courts should lend guidance and direction to OSHA and permit the agency to rectify constitutional errors without imposing the exclusionary sanction simply acknowledges that the exclusionary rule is a judicial creation and that all possible alternatives to it should be explored before courts impose it. Since OSHA was granted a broad legislative objective to assure each worker a workplace free of occupational health and safety hazards, courts should be supportive of good faith attempts by the agency to fulfill its mandate. Indeed, it can be argued that the provision of the Act which authorizes warrantless inspections of workplaces was enacted by Congress based on its balancing of the respective interests at stake.²²⁷ Congress resolved the conflict of competing interests by placing a higher priority on the discovery of health and safety violations than on the protection of an employer's fourth amendment rights.²²⁸

220. 1981 O.S.H. DEC. (CCH) 31,527, *aff'd*, 693 F.2d 1061 (11th Cir. 1982).

221. See OSHA Instruction CPL 2.12B (Feb. 1, 1982) (available from OSHA Office of Information and Consumer Affairs). As a practical point, changes in presidential administrations often herald changes in OSHA inspection procedures.

222. See *Wolf v. Colorado*, 338 U.S. 25 (1949); see also *United States v. Wolffs*, 594 F.2d 77, 85 (5th Cir. 1979) (violation of statute did not warrant exclusion of evidence absent widespread abuse of Act).

223. 338 U.S. 25 (1949).

224. 232 U.S. 383 (1914).

225. *Wolf v. Colorado*, 338 U.S. 25, 30-32 (1949); cf. *Bivens v. Six Unknown Named Agents*, 403 U.S. 388 (1971) (creates a federal cause of action against federal agents for constitutional violations). See generally Foote, *Tort Remedies for Police Violations of Individual Rights*, 39 MINN. L. REV. 493 (1955).

226. See *Mapp v. Ohio*, 367 U.S. 643, 656 (1961).

227. See 29 U.S.C. § 657(a) (1976).

228. "[I]t is important to note that warrantless civil inspections are both absolutely

Although *Marshall v. Barlow's, Inc.*²²⁹ held that Congress was incorrect to the extent that it authorized warrantless searches, courts should accord great deference to the legislature's balancing of interests and priority setting in determining whether to apply a judicially-created sanction to fourth amendment violations.

IV. CONCLUSION

The question of whether the exclusionary rule should be applied in OSHA civil enforcement proceedings will undoubtedly reach the Supreme Court for final resolution.²³⁰ Traditionally, standing to apply the exclusionary rule has been carefully limited to situations where the government seeks to use such evidence to incriminate victims of a search in criminal proceedings.²³¹ Although the rule has been extended to quasi-criminal proceedings, it is unclear whether OSHA proceedings are quasi-criminal in character because they are designed to effectuate remedial rather than punitive purposes.

In deciding whether to apply the exclusionary rule to OSHA civil enforcement proceedings, the Supreme Court should weigh the privacy interests of employers against the societal costs of suppressing relevant and probative evidence which establishes dangerous health and safety conditions in the workplace. It is suggested that the exclusionary rule should not be applied in this context because employers possess a lesser expectation of privacy than individuals in their person or residence. Indeed, the important liberty interests involved in the criminal search are not at stake in the context of an OSHA search. Moreover, application of the exclusionary rule is premature. A mechanical application of

essential to this Act's enforcement and a long-standing federal practice." 123 CONG. REC. 325 (1977) (statement of Rep. Steiger, a principal sponsor of the Act).

229. 436 U.S. 307 (1978).

230. While this article was in the process of publication, a conflict between the circuits developed regarding the application of the exclusionary rule and the recognition of a good faith exception in the context of OSHA proceedings. The Eleventh Circuit, in *Donovan v. Sarasota Concrete Co.*, 693 F.2d 1061 (11th Cir. 1982), recently affirmed an OSHRC decision applying the exclusionary rule to OSHA proceedings. While the court substantially adopted the reasoning and analysis of OSHRC, it did hint that with regard to the good faith exception it preferred to adopt a case-by-case approach. *Id.* at 1072. Thus, the court felt that the facts of *Sarasota* did not warrant use of the good faith exception because, "[i]n essence, OSHA officials decided to risk a questionable search and now expect to escape responsibility by alleging good faith." *Id.*

The Seventh Circuit, however, in *Donovan v. Federal Clearing Die Casting Co.*, 695 F.2d 1020 (7th Cir. 1982), reh'g denied *en banc*, Apr. 14, 1983, suggests that the exclusionary rule is inapplicable to OSHA proceedings. Moreover, the court stated that even if the exclusionary rule is applicable to OSHA, a good faith exception should be recognized.

Given the reluctance of the Supreme Court to impose the exclusionary sanction in *United States v. Janis*, 428 U.S. 433 (1976), and the growing emphasis on excluding only that evidence which is seized as a result of flagrant or bad faith police conduct, it would be reasonable to expect the Burger Court to decline application of the exclusionary rule to OSHA proceedings.

231. See *United States v. Calandra*, 414 U.S. 338, 348 (1974).

the rule to the new and emerging fourth amendment problem of OSHA inspections will not effectuate congressional intent to assure health and safety in the American workplace. Rather, courts may resort to less drastic means of deterring technical violations of the fourth amendment,²³² saving the ultimate sanction of the exclusionary rule for flagrant violations.

If the Supreme Court ultimately decides to apply the exclusionary rule to OSHA proceedings, it may best accommodate the competing interests involved by utilizing the good faith exception as enunciated in *United States v. Williams*.²³³ If employers can establish a fourth amendment violation, then the burden will be on OSHA officials to demonstrate a good faith belief that they were acting within constitutional bounds. Failure to shoulder this burden will result in the suppression of illegally obtained evidence.

Since its inception, the exclusionary rule has been the object of debate within the legal community. The scope and application of the rule have been narrowed to achieve the rule's primary objective of deterring police misconduct in the quest for criminal evidence. The costs of applying the rule in criminal cases have been assailed by its critics because "criminals go free when the constable blunders."²³⁴ Unfortunately, the costs of applying the rule in OSHA civil enforcement proceedings may be measured by the lives of American workers.

232. See, e.g., *Bivens v. Six Unknown Named Agents*, 403 U.S. 388 (1971) (creates a federal cause of action against federal agents for constitutional violations).

233. 622 F.2d 830 (5th Cir. 1980) (en banc) (per curiam), cert. denied, 449 U.S. 1127 (1981).

234. See Wright, *Must the Criminal Go Free if the Constable Blunders?*, 50 TEX. L. REV. 736 (1972).